United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18,366

OSCAR DANCY, JR.

Appellant

v.

UNITED STATES OF AMERICA

Appellee

742

Appeal from a judgment of the
UNITED STATES DISTRICT COURT
For the District of Columbia

NEWELL A. CLAPP

BERNARD M. BERMAN
Court-Appointed Counsel
1144 Pennsylvania Building
Washington, D. C.

ANDREW W. McTHENIA, JR.
Court-Appointed Counsel
711 Princess Street
Alexandria, Virginia

STATEMENT OF QUESTIONS PRESENTED

I

Whether the proceedings at the preliminary hearing on the narcotics charge against the indigent appellant, a narcotics addict, where appellant had no counsel and was not informed of his right to assigned counsel, were such that appellant's conviction of assault on the complaining witness, a police officer, during his cross-examination by appellant, must be vacated and the indictment dismissed.

II

Whether the failure to afford appellant the assistance of assigned counsel at his arraignment was a denial of his constitutional rights.

III

Whether the failure to afford appellant the assistance of assigned counsel for 67 days following the alleged assault was a denial of his constitutional rights.

IV

Whether the failure to afford appellant the assistance of assigned counsel until after the preliminary hearing on the narcotics charges and the arraignment on the assault indictment was a denial of his constitutional right to the equal protection of the laws.

UNITED STATES COURT OF APPEALS

For The District of Columbia

NO. 18,366

OSCAR DANCY, JR.

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Appeal from a judgment of the
United States District Court
For the District of Columbia

Brief for Appellants

INDEX

TABLE OF CASES AND AUTHORITIES

JURISDICTIONAL STATEMENT

The appellant appeals from a conviction in the United States District Court for the District of Columbia on a one-count indictment charging a violation of 22 D.C. Code §505(a), Assault on a Member of the Police Force. On October 25, 1963, a jury found the appellant guilty of assault on a member of the Police Force, Officer Moore. On January 10, 1964, the appellant was sentenced to a period of imprisonment of forty-five days to six months.

On the same day, the Honorable John J. Sirica, United States District Judge, ordered that the appellant be allowed to prosecute his appeal without prepayment of costs.

The jurisdiction of this Court on appeal in this case is founded upon the Act of June 25, 1958, C. 646, 62 Stat. 929, U.S.C. Title 28, §1291, as amended.

STATEMENT OF THE CASE

The indigent appellant, Oscar Dancy, Jr., 37 years of age, appeals from his conviction on an indictment charging Assault on a Member of the Police Force, Case No. 18366 in this Court (Criminal No. 379-63 in the District Court). The assault on a police officer was alleged to have occurred during a preliminary hearing on a narcotics charge (Criminal No. 380-63 in the District Court).

Although the narcotics offense was alleged to have occurred on December 7, 1962, and the assault on a police officer was alleged to have occurred on April 1, 1963 (during appellant's preliminary hearing on the narcotics charge), appellant was tried on the assault charge first and convicted on October 25, 1963. He was not tried and convicted on the narcotics charge until May 18, 1964, nearly seven months after his conviction in the assault case.[1/]

The series of events leading up to the alleged assault began prior to the April 1, 1963, preliminary hearing on the narcotics charge during which the appellant was

---

1/ The appellant has appealed his conviction on the narcotics charge in Case No. 18716 in this Court.

alleged to have assaulted Police Officer Rufus Moore.[2/]

On April 1, 1963, the appellant was served with a warrant of arrest at the District of Columbia Jail (Rec.). He was thereupon brought before United States Commissioner Wertleb upon a complaint filed by Officer Rufus Moore on March 15, 1963, charging that the appellant unlawfully possessed and sold narcotics.[3/]

The Record of the Proceedings indicates that, although the Commissioner advised the appellant of his right to retain counsel, he did not advise him of his right to have counsel appointed by the Court. The Commissioner proceeded to hold a preliminary hearing in absence of counsel for the accused.

The record of proceedings on Form 100 indicates that during the direct examination of Officer Moore the

---

2/ On February 4, 1963, the appellant was arrested on a robbery charge (Crim. No. 263-63, Record of Criminal Proceedings before United States Commissioner, Docket 8, Case 51) and after a preliminary hearing on February 12 he was committed to D. C. Jail to await action by the Grand Jury. The Grand Jury returned an indictment charging appellant with robbery and assault with intent to commit robbery, but the Government filed a motion to dismiss the indictment, which was granted on April 30, 1963.

3/ The record on appeal in the narcotics case, No. 18716, indicates that an Assistant United States Attorney signed a short mimeographed form on March 6, 1963 (26 days before the preliminary hearing), requesting that Commissioner Wertleb issue a warrant of arrest for the appellant.

appellant smacked his fists on the counsel table and left the hearing room. The Record makes no mention of the alleged assault by the appellant on the police officer. No stenographic record of the hearing was made. The Commissioner made a finding of probable cause, on the narcotics complaint, set bail at $3,500 and committed appellant to District of Columbia Jail to await the action of the Grand Jury.

On April 22, 1963, an indictment was filed charging the appellant with assault on a member of the Police Force in violation of 22 D.C.C. §505(a). The appellant was not afforded a preliminary hearing with respect to the assault charge prior to this indictment. A separate three-count indictment charging the appellant with violation of the narcotics laws, 26 U.S.C. §4074(a), 26 U.S.C. §4075(a) and 21 U.S.C. 174, was also filed on April 22, 1963.

On April 26, 1963, the appellant was arraigned without counsel on both the narcotics indictment and on the assault indictment before the Honorable Matthew F. McGuire, Chief Judge of the United States District Court for the District of Columbia. Assistant United States Attorney Marvin Loewy appeared for the Government. A plea of not guilty was entered by the Court on both indictments and the Court ordered the Clerk to appoint counsel for the defendant.

On May 6, 1963, the District Court appointed counsel for the appellant on the assault charge.[4/] On June 7, the order of appointment of May 6 was vacated and new counsel was appointed for the assault case.

On June 26, 1963, counsel for Dancy in the narcotics case filed a motion requesting a mental examination of the appellant.

On July 2, 1963, the Court entered an order in both the assault and narcotics cases committing the appellant to St. Elizabeth's for a 90-day mental examination to determine his competency to stand trial and to determine whether the appellant was suffering from a mental defect on December 7, 1962, the date of the alleged narcotics offense, and on April 1, 1963, the date of the alleged assault on a police officer.

In a letter dated September 27, 1963, to the Clerk of the District Court from Dale C. Cameron, Superintendent of St. Elizabeth's Hospital, it was reported that the appellant was competent to stand trial. It further concluded that appellant was a narcotics addict and that his acts on December 7, 1962, and April 2, 1963, were related to his narcotics addiction; however, it was

---

4/ On May 3, 1963, separate counsel was appointed for the appellant on the narcotics charge.

concluded that the defendant was not suffering from a mental defect or disease (Rec.).

On October 23, 1963, appellant was brought to trial on the assault charge. United States Commissioner Wertleb testified that, after the appellant had been cross-examining the complaining witness, Police Officer Moore, for several minutes, the appellant became enraged, striking the officer in his face and kicking him until a United States Marshal and a police officer restrained the accused. Officer Moore also testified to the same effect.

The defense relied upon by the appellant was that he was not guilty by reason of insanity and that he had acted upon an irresistible impulse. Marion Whitney testified for the defense that she had lived with the appellant for several years and that the appellant acted "oddly" when he was taking drugs and, also, when he could not obtain them. She stated that on several occasions the appellant would squeeze her until she screamed and then he would laugh. (Tr. 44-45.)

The appellant took the stand and testified that he hurt the witness, Whitney, because he "was hurting himself." He also testified that he hit Officer Moore because of his girl and his daughter.

Two psychiatric witnesses, who had interviewed the appellant only once at St. Elizabeth's, testified that

they concluded appellant was not suffering from a mental defect and that mere drug addiction was not a mental defect. Both psychiatric witnesses testified that Dancy had once been diagnosed as a sociopath by another psychiatrist but that they did not agree with that diagnosis. No psychiatric witness testified on behalf of the appellant.

The Court granted appellant's request for an insanity instruction but denied a request for an instruction on irresistible impulse.

The jury returned a verdict of guilty on October 25, 1963.

Judge John J. Sirica continued the sentencing of appellant to await the result of his trial on the narcotics case.

Finally, on January 10, 1964, Judge Sirica sentenced the appellant to imprisonment for between 45 days and six months on the assault conviction. During the sentencing proceedings, Judge Sirica stated that he could delay sentencing no longer.

The appellant has completed serving his full six months on the assault offense and is now imprisoned because of his conviction in the narcotics case (No.18366).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rule of Criminal Procedure 5(b), (c):

> "(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.
>
> "(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as

provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

Federal Rule of Criminal Procedure 44:

"Assignment of Counsel. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

The Code of the District of Columbia, Title 2, §2202:

"§2-2202. Counsel for indigents to be provided in criminal proceedings and proceedings of a criminal nature.

"The Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases, and in cases involving offenses against the United States in which imprisonment may be for one year or more in the Municipal Court for the District of Columbia, in proceedings before the Coroner for the District of Columbia and the United States Commissioner, in proceedings before the juvenile court of the District of Columbia, and in proceedings before the Commission on Mental Health of the District of Columbia and proceedings in the courts arising therefrom.

"The Agency shall from time to time advise each of the courts and tribunals named in this section of the names of the attorneys employed by the Agency who are available to accept assignments in said court or tribunal. The judges or other presiding officers of the several courts and tribunals may assign attorneys employed by the Agency to represent indigents, such assignments to be upon a case-to-case basis, a group-of-cases basis, or a time basis, as the assigning authority may prescribe. Each such court and tribunal will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable."

STATEMENT OF POINTS

1. Appellant, a narcotics addict without funds to retain counsel, was so irreparably prejudiced by proceeding without assigned counsel at the preliminary hearing on the narcotics charge, and without being advised of his right to have assigned counsel, that the assault conviction should be vacated and the indictment dismissed. There is a strong probability that, if appellant had had such counsel, the assault would not have occurred. Everyone present at the preliminary hearing knew appellant was a narcotics addict and emotionally unstable. The events of the hearing were such that the assault, when it occurred, should have surprised no one. When the appellant was allowed to cross-examine the complaining witness, he was tempted beyond his power to resist, especially when it is realized that he was in a hostile group with no one to help him.

2. Appellant was denied his constitutional right to assigned counsel at his arraignment. This is an absolute right and its denial requires a vacation of the conviction and a dismissal of the indictment. Moreover, appellant was irreparably prejudiced by this failure to afford him assigned counsel at his arraignment.

3. Failure to appoint counsel for 67 days after the alleged assault was a denial of appellant's constitutional right to the effective assistance of counsel and to a speedy trial. This delay was unwarranted; appellant's defense was irreparably and adversely affected and his trial unduly delayed. Accordingly, the conviction must be vacated and the indictment dismissed.

4. Failure to assign counsel for the preliminary hearing on the narcotics charge and for his arraignment on the assault indictment was a denial of appellant's constitutional right to the equal protection of the laws and requires a vacation of the conviction and a dismissal of the indictment.

SUMMARY OF ARGUMENT

I

The appellant was irreparably prejudiced and his constitutional rights denied to him by the errors committed prior to and during his preliminary hearing in the narcotics case on April 1, 1963. The Commissioner failed to advise appellant of his right to assigned counsel and did not appoint counsel for this appellant for his preliminary hearing, contrary to the provisions of the 1960 Legal Aid Act for the District of Columbia. Although the indigent appellant, a narcotics addict, manifested extreme emotional disturbance in the earlier part of the preliminary hearing, the Commissioner, nevertheless, allowed the appellant to cross-examine pro se the Government's chief witness against him, a police officer. Furthermore, the Commissioner did not report in his official notes of the proceedings all that occurred. This appellant has already served his sentence in this case and it would be most unfair to require him to be tried again on the same charge. Therefore, appellant urges that the Court vacate his conviction of assault and remand with instruction to dismiss the indictment.

II

The Supreme Court has held that an arraignment is a sine qua non to the trial itself, a critical stage in the criminal proceedings against an accused, where the issues are formulated and his plea entered. It was a violation of the appellant's absolute right to the assistance of counsel that he was denied assigned counsel at his arraignment; moreover, he was irreparably prejudiced by this denial.

III

The failure to afford the appellant the assistance of counsel for the crucial 67 days after the alleged assault and his commitment to D. C. Jail deprived him of the effective assistance of counsel guaranteed by the Sixth Amendment and had the attendant effect of depriving him of a speedy trial.

Recent decisions of the United States Supreme Court and of this Court make it clear that the right to the assistance of counsel in a criminal case encompasses such assistance in the preparation as well as in the trial itself. Unless the accused has the assistance and advice of counsel during the crucial weeks following arrest (or in this case upon imprisonment after the alleged offense) in order that counsel may gather evidence essential to the preparation of the defense, then the trial becomes

a sham and, though it may conform to technical procedural requirements, is devoid of that fundamental fairness guaranteed to all defendants in criminal cases.

The irreparable prejudice that occurred because of the delay in the appointment of counsel seriously impaired counsel's ability to adequately prepare appellant's defense at trial. After such prejudice occurred, no trial, no matter how expeditiously arranged, would have been a fair or speedy trial and appellant's constitutional rights were thereby denied.

IV

Rule 5(b) and Rule 44 of the Federal Rules of Criminal Procedure provide, in effect, that the commissioner and the court shall advise an accused of his right to retain counsel in every stage of the criminal proceedings against him, unless he elects to proceed without counsel. The failure of these Rules to require that the commissioner and the court advise an indigent accused that he has a right to assigned counsel and to appoint such counsel, unless the accused intelligently and understandingly waives assigned counsel, is an invidious discrimination between the rich and the poor. Because this appellant was not advised of his right to have counsel for his preliminary hearing and arraignment, and because no counsel was appointed for him until long after his arraignment, he was denied the equal protection of the laws.

I

THIS INDIGENT APPELLANT, A NARCOTICS ADDICT, WAS SO IRREPARABLY PREJUDICED BY PROCEEDING WITHOUT ASSIGNED COUNSEL AND WITHOUT BEING ADVISED OF HIS RIGHT TO HAVE ASSIGNED COUNSEL AT HIS PRELIMINARY HEARING ON THE NARCOTICS CHARGE THAT THE INDICTMENT RETURNED AGAINST HIM IN THIS ASSAULT CASE, WHICH WAS THE DIRECT RESULT OF HIS UNCOUNSELED CONDUCT DURING SUCH PROCEEDINGS, SHOULD BE DISMISSED AND HIS CONVICTION REVERSED.

The indigent appellant, a narcotics addict, appearing at the preliminary hearing on the narcotics charge without counsel and without being advised he had a right to assigned counsel, allegedly attacked a police officer during the proceedings. At the outset of the hearing, the appellant, upon hearing the police officer testify against him, pounded on the counsel table with his fists and walked out of the hearing room. Later, the Commissioner informed the appellant that he could cross-examine the police officer and thereupon the Commissioner allowed the appellant to cross-examine his accuser without the advice or assistance of counsel. When the officer answered one of appellant's questions, appellant became enraged and struck him.

It cannot be asserted with certainty that but for the presence of counsel the alleged attack would never have occurred, but there is a very strong probability that advice of counsel prior to the hearing and a restraining

word or hand during the hearing would have prevented what occurred.

In Powell v. State of Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932), the Court speaking through Mr. Justice Sutherland stated:

> ". . .The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. . . ." 287 U.S. at 68-69. (Emphasis supplied.)

Prior to his appearance before the Commissioner for a preliminary hearing on the narcotics charge, the appellant had been imprisoned for some 55 days on a robbery charge.[5/] The day after his arrest on the robbery charge,

---

5/ The appellant was arrested and charged with robbery on February 4, 1963. He was subsequently indicted for robbery, but this indictment was dismissed upon the motion of the Government on April 30, 1963.

he was interrogated by Officer Fogle of the Narcotics Squad of the Metropolitan Police Department and at that time appellant was informed that no charges involving narcotics were pending against him.[6/] Although the appellant thought he was "clean" with respect to any narcotics violation, the Narcotics Squad was at that time building a case against him.[7/]

Appellant's first knowledge of such charges came on April 1, 1963, when he was taken before the Commissioner to answer the complaint that he had unlawfully possessed narcotics and had sold narcotics to a "special agent" for the Metropolitan Police Department on December 7, 1962, 114 days earlier.

It was at the April 1 hearing that he again encountered Officer Fogle, heard the charges and was advised of his right to remain silent, his right to a

---

6/ Narcotics Trial Tr. 115-116.

7/ On cross-examination counsel for appellant questioned Officer Fogle during the narcotics trial:

"Q. Detective Fogle, at that time, as a matter of fact, you were in charge -- you and your partner, Detective Brewer -- were in charge of an investigation of a case concerning Dancy, were you not?

"A. That is true, sir." (Trial Tr. 118)

preliminary hearing and his right to retain counsel.[8/]

At no time did the Commissioner advise the appellant of his right to have counsel appointed by the court, though on the robbery charge this same Commissioner had appointed counsel to represent the appellant at his preliminary hearing on February 12, 1963.

The appellant elected to proceed without retained counsel. During the preliminary hearing on the narcotics charge, appellant allegedly assaulted Officer Moore. However, in the Commissioner's official record of the proceedings, there is no reference to the assault (Rec.). Furthermore, there was no stenographic record made of this proceeding.[9/]

8/ The Record of Criminal Proceedings before the Commissioner in the preliminary hearing in the narcotics case held on April 1, 1963 (Crim. No. 380-63, Commissioner's Docket 8, Case 343) indicates by a machine imprint that the defendant was advised of his right to remain silent, his right to have a preliminary hearing and his right to retain counsel. After the machine imprint, the following words were typed on the front side of the Commissioner's Record: "Defendant requested a hearing now -- Probable cause shown -- see reverse side for testimony." The Record of Criminal Proceedings before the Commissioner does not indicate that the Commissioner advised the appellant of his right to have counsel assigned. Nor did the Commissioner in his testimony during the appellant's assault trial state that he had advised the appellant of his right to have counsel assigned (Tr. 32-40).

9/ This Court held in Washington v. Clemmer, __U.S.App.D.C. __, __F.2d __ (No. 18602, May 11, 1964) (slip opinion), that defendant was entitled to have present at the preliminary hearing a stenographic reporter furnished by the United

At the trial on the assault charge, Commissioner Wertleb testified (from notes),[10] on direct examination as a Government witness, that, after Officer Moore was questioned for several minutes on direct examination at the preliminary hearing, "Mr. Dancy took both hands . . . and hit them hard on the council table and stalked out of the hearing room and back toward the United States Marshal's cellblock." (Tr.36.)

9/ (continued) States District Court or the United States Attorney or the committing magistrate, saying (slip opinion at 3-4):

". . .The preliminary hearing is an adversary judicial proceeding necessary to authorize continued constraint of the accused. Absence of a transcript makes it difficult, if not impossible, to review the Commissioner's finding of probable cause. And verbatim recording of testimony at an early stage of the process perpetuates the fresh memory of witnesses, making it available in case of subsequent death, disability, or flight, and allowing impeachment or refreshing of recollection at trial. Accordingly, early recording also serves to discourage threats against witnesses and suborning of perjury.

"And even if the absence of a transcript might ultimately be found not prejudicial, obviously it is not possible to predict such an eventuality, and the Commissioner should therefore ordinarily grant a request for a reporter.

"We think these reasons justify the exercise of our supervisory power over the administration of criminal justice in the District of Columbia to require stenographic recording of testimony at the preliminary hearing."

10/ These notes were not made part of the record.

The Commissioner further testified that, after Dancy returned and apologized for his conduct, the direct examination of Officer Moore continued. After this direct examination, the Commissioner advised the appellant that he could ask questions of Officer Moore:

> "Then there came a point when I asked Mr. Dancy if he wished to cross-examine Mr. Moore, and ask him certain questions, and he said he did, and he asked several questions, and the answer to one of them, after which he arose suddenly from his seat at counsel table and ran around to the end of the table, to where Mr. Moore was seated in the witness stand and made contact with Mr. Moore's face, by landing several punches, before Mr. Moore was able to get out of his way by getting out of his swivel seat and jumping across the counsel table, at which point the Marshal and Detective Fogle were able to restrain Mr. Dancy." (Tr. 34.)

At the trial, defendant's counsel asked the Commissioner at what point during appellant's cross-examination of Moore at the preliminary hearing did appellant attack him? The Commissioner replied:

> ". . .The particular question that was asked was: are you sure that I am the man that the special employee gave - that I am the man that the special employee gave the money to [sic], and that I gave a small package to him, and Mr. Moore testified, that there is no doubt in my mind, you are the man, and at that point he suddenly arose from counsel table and rushed around to the witness stand and assaulted the officer." (Tr.37.)

There was some evidence adduced at the narcotics trial that appellant had exchanged remarks with Officer Fogle, who, although present at the April 1 preliminary

hearing, was not called upon to testify.[11]

Not only did the Commissioner fail to appoint counsel at the outset to represent this appellant, but even after the appellant stalked from the hearing room after an emotional outburst, the Commissioner allowed this highly disturbed narcotics addict, who had been in prison for two months, to conduct his own cross-examination of the Government's chief witness, Officer Moore.

The failure of the Commissioner to appoint counsel for the appellant's preliminary hearing was in contravention of the mandate of the 1960 Legal Aid Act for the District of Columbia.[12]

In the recent decision of Blue v. United States, __U.S. App. D.C.__, __F. 2d___ (No. 18401, October 29,

---

11/ During the appellant's trial on the narcotics charge, Commissioner Wertleb again testified with respect to the preliminary hearing of April 1, 1963. Mr. Amos, counsel for the appellant in that case, asked the Commissioner:

"Q. Mr. Wertleb, did you ever hear Dancy, this defendant, say to Detective Fogle, 'You have crossed me up?'

"A. I don't recall it. I conducted a preliminary hearing, and all my notes are pertinent to that particular hearing. I made no notes of any words that may have been exchanged between Mr. Dancy and Detective Fogle; and at this point I have no recollection, although they could have said something to each other, which I didn't note." (Trial Tr. 126.)

12/ D. C. Code §2-2202.

1964) (slip opinion), this Court held that the 1960 Legal Aid Act for the District of Columbia requires that the Commissioner appoint counsel for indigent defendants at hearings in felony cases.[13/]

One of the purposes of a preliminary hearing is to perpetuate the fresh memory of events and testimony of Government witnesses. Another purpose of the preliminary hearing, as stated in Blue, is to afford the accused "a chance to learn in advance of trial the foundations of the charges and the evidence that will comprise the Government's case against him." To do this at all effectively, the accused needs the assistance of counsel. An equally important function of counsel is to advise the accused not to say or do anything which would tend to incriminate or prejudice him.[14/]

The irregularities and inadequate procedures that occurred during appellant's preliminary hearing have been condemned in Washington v. Clemmer, supra, and Memorandum

---

13/ The court noted in Blue: ". . .Recent court opinions would seem to indicate that an indigent brought before the Commissioner is entitled to assigned counsel at the preliminary hearing before him. The Advisory Committee on the Federal Rules of Criminal Procedure has recommended that Rule 5(c) be amended to require the Commissioner to advise the accused indigent of his right to assigned counsel . . . ." Supra, at 7, n.5 (slip op.).

14/ The letter of September 27, 1963, from St. Elizabeth's, reporting on appellant's psychiatric condition, stated that he was a narcotics addict and that his alleged assault on April 1, 1963, was causally related to his narcotics addiction.

of Opinion of Chief Judge Bazelon in Johnson & Stewart v. United States of America, __U.S.App.D.C.__, __F. 2d___ (Nos. 18243, 18244, September 25, 1964) (slip opinion).[15/]

In the Blue case, the remedy established by this Court for remedying irregularities and inadequacies in preliminary proceedings was by writ of habeas corpus or by mandamus before indictment but the Court pointed out that, where the defendant was prejudiced by inadequacies or irregularities at the preliminary hearing, failure of his counsel to raise the issue by mandamus or by habeas corpus would not necessarily preclude relief depending on the circumstances of a particular case.

In Blue this Court stated, p. 14:

> ". . .In light of the generally recognized purposes of a preliminary hearing, it is not without significance that he has couched his prayer for relief here in these terms [i.e., absolute right to counsel], rather than urging upon us that the Commissioner's error so impaired his ability to defend himself at his first trial that another should be granted for that reason alone. For

---

15/ The prejudice imposed upon an accused, when, as in this case, no stenographic transcript was made of the preliminary hearing and the record consists of such notations as the Commissioner sees fit to incorporate in the record, is discussed in Johnson & Stewart v. United States, supra. The present case represents an aggravated example of the necessity for a transcript. As already stated, the notes from which the Commissioner testified were not placed in the record.

> this is the precise issue we face in considering whether some relief short of dismissal of the indictment should be ordered."

In this case the appellant urges that the Commissioner's errors

> (1) in failing to provide appellant with appointed counsel;
>
> (2) inadequately recording the proceedings during the preliminary hearing; and
>
> (3) in allowing the appellant to cross-examine Officer Moore after his earlier emotional outburst --

so tainted the preliminary hearing with unconstitutionality and irrevocable prejudice to the accused as to render his indictment on the assault charge a nullity.

The appellant has already served his sentence on the assault charge and a new trial could not eliminate the prejudice he has suffered by reason of the Commissioner's errors. Only a dismissal of the indictment would set the record straight; a new trial would expose the appellant to further incarceration after he had already served a jail sentence on the assault charge.

There is no way of ascertaining what the appellant would have done if counsel had been present, but where prejudice has occurred, the Supreme Court has pointed out that the deprivation of the assistance of counsel "is too fundamental and absolute to allow courts to indulge in nice

calculations as to the amount of prejudice arising from its denial." 16/ The prejudice is clear. Everyone involved knew Dancy was a drug addict; they knew he was emotionally unstable; he first flew into a rage and "stalked" out of the hearing; the Commissioner permitted the hearing to continue even after Dancy returned to the hearing room and despite the clear evidence that Dancy's emotional state was such that anything could happen - and all during this time he was without counsel to assist and advise him. The stage was set for another emotional outburst and the alleged assault should have surprised no one. The fact is, we submit, that Dancy was tempted beyond his power to resist, especially when it is realized that he was in a hostile group with no one to turn to or to help him. 17/ If he had had counsel the course of events might have been different.

16/ Glasser v. United States, 315 U.S. 60, 76, 62 S. Ct. 457, 467 (1942).

17/ At the trial the appellant testified: ". . .I started to go in the Commissioner's office, there is the Commissioner, Officer Fogle, and the Marshal . . . .

"There is no stenographer in there, no attorney or anything in there, you know. What I mean, man, I was by myself. You know, the Commissioner wasn't taking down any notes, and I don't know where he got the notes he had here yesterday because nobody was making a regular formality in there, just one against me." (Tr. 77.)

Under all the circumstances of this unfortunate case, we urge that the resulting indictment for assault should be dismissed. Only by so doing, will justice be done.[18/]

II

FAILURE TO AFFORD APPELLANT THE ASSISTANCE OF ASSIGNED COUNSEL AT HIS ARRAIGNMENT WAS A DENIAL OF THE CONSTITUTIONAL REQUIREMENT THAT COUNSEL BE MADE AVAILABLE AT EVERY CRITICAL STAGE OF THE CRIMINAL PROCEEDINGS AGAINST HIM.

On April 26, 1963, the appellant appeared for his arraignment without counsel before the Honorable Matthew F. McGuire, Chief Judge of the United States District Court for the District of Columbia. Marvin Loewy appeared as Special Assistant to the United States Attorney. The record of proceedings is set forth below:

"THE DEPUTY CLERK: Oscar Dancy, Jr., Criminal No. 379 [the Assault Case] and 380-63 [the Narcotics Case]. Oscar Dancy, Jr., have you received copies of your indictments?

"THE DEFENDANT: Yes, I have.

"THE DEPUTY CLERK: Do you have an attorney?

"THE DEFENDANT: I don't want one.

18/ Complete justice cannot be done, as defendant has already served his jail sentence.

"THE DEPUTY CLERK: Do you intend to get one?

"THE DEFENDANT: No.

"THE COURT: What do you intend to do? You are charged with the crime of an assault on a member of the police force and --

"THE DEFENDANT: I don't enter no pleas on it.

"THE COURT: Enter a plea of not guilty in both cases. Trial on the charge of an assault on a member of the police force June 19 and trial on the charge of violation of the narcotic laws July 9.

You had better make up your mind what you are going to do. Are you going to defend yourself?

"THE DEFENDANT: Am I going to defend myself?

"THE COURT: Are you going to defend yourself?

"THE DEFENDANT: I am not going to do anything.

"THE COURT: I want to bring home to you the fact you are going to trial. Are you going to be your own lawyer?

"THE DEFENDANT: I don't have no qualifications to be lawyer. I don't want a lawyer.

"THE COURT: You understand you will probably spend the summer in jail.

"THE DEFENDANT: You are doing it anyway.

"THE COURT: Appoint counsel for him, and I do not want to know who is going to be appointed. I will have to apologize to him for the rest of my life."

The Court did not advise the appellant that he was entitled to have assigned counsel for his arraignment. It cannot be said that the appellant intelligently and understandingly waived his constitutional right to have such counsel.

In the Supreme Court's decision in Hamilton v. State of Alabama, 368 U.S. 52, 82 S. Ct. 157 (1961), Mr. Justice Douglas noted:

> "Arraignment has differing consequences in the various jurisdictions. Under federal law an arraignment is a sine qua non to the trial itself -- the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried. . . ." 82 S. Ct. at 158-159, n. 4.

In Hamilton, the United States Supreme Court held that under Alabama law arraignment is a critical stage in a criminal proceeding and that denial of counsel at arraignment required reversal of the conviction without regard to prejudice. The Supreme Court of Alabama had denied relief because there was no showing or attempt to show that petitioner was "disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty." Ex parte Hamilton, 271 Ala. 88, 122 So. 2d 602, 607 (1960).

The Alabama Supreme Court pointed out that Hamilton was arraigned without counsel on March 1, 1957, and pleaded not guilty. A lawyer was appointed to represent

defendant on March 4, 1957. The court stated that the competence of that lawyer "is not questioned" and that he "asserts in an affidavit filed in this proceeding that he would not have entered any different plea than the plea that was entered by the defendant on March 1, 1957." 122 So. 2d at 607.

In reaching its decision, the Alabama Supreme Court relied upon Council v. Clemmer, 85 U.S. App. D.C. 74, 177 F. 2d 22 (1949), saying:

> "In a number of Federal Cases where the defendants were entitled to the benefit of counsel, it has been held that there was no abridgment of the right to counsel where the defendant was arraigned before counsel was appointed to represent him and the defendant pleaded not guilty. Even where the defendants pleaded guilty on arraignment the failure to appoint counsel has been said not to have been prejudicial where counsel was appointed immediately after arraignment and full opportunity was given to withdraw the plea or to take whatever steps were necessary or desirable without regard to what previously transpired. Council v. Clemmer, 85 U.S. App. D.C. 74, 177 F. 2d 22, and cases cited; Young v. United States, 8 Cir., 228 F. 2d 693." 122 So.2d at 604.

Less than two years after its decision in Hamilton v. Alabama, supra, the United States Supreme Court held in White v. State of Maryland, 373 U. S. 59, 83 S. Ct. 1050 (1963), that failure to afford counsel to the defendant at his preliminary hearing required reversal of a murder conviction, holding that this result was governed by the Hamilton case. The Supreme Court pointed out that the plea

of guilty entered at the preliminary hearing by White was introduced in evidence at his trial but added this footnote: "Although petitioner did not object to the introduction of this evidence at the trial (227 Md. at 619-620, 177 A. 2d at 879), the rationale of Hamilton v. Alabama, supra, does not rest, as we shall see, on a showing of prejudice." 83 S. Ct. at 1051. (Emphasis supplied.)

In Evans v. Rives, 75 U.S. App. D.C. 242, 126 F. 2d 633 (1942), this Court had occasion to consider the petition of a defendant who was without counsel at the time of his arraignment when he entered a plea of guilty. In discussing the nature of the arraignment as an important and critical stage of the proceedings against a defendant, this Court said:

> ". . .Since as stated in Johnson v. Zerbst a waiver is an intentional relinquishment or abandonment of a known right or privilege, and since the petitioner did not know and was not advised of his right to counsel, he could not waive the same.
>
> "Since this is true and since, as said in Johnson v. Zerbst, 'The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel,' the contention of the District of Columbia in the instant case that the petitioner's conviction was valid amounts in effect to an assertion that the constitutional guarantee that in criminal prosecutions the assistance of counsel for his defense does not apply at the arraignment, where the accused is required to stand at the bar, to hear the charge, and to enter a plea. But an accused is no less

> an accused at that stage of the proceedings than at any other, and, as we have pointed out above, no less in need at that stage than at any other of the assistance of counsel. The constitutional guarantee makes no distinction between the arraignment and other stages of criminal proceedings in respect of the application of the guarantee. As said in the statement quoted from Johnson v. Zerbst, '"If charged with crime, he [the accused] is incapable, generally, of determining for himself whether the indictment is good or bad. . . . He requires the guiding hand of counsel at every step in the proceedings against him."' (Italics supplied)." 126 F. 2d at 641.

When the trial court failed to appoint counsel to represent appellant at his arraignment, it denied him assistance at an important and critical stage of the criminal proceeding against him and which was "a sine qua non to the trial itself." While no prejudice need be shown, appellant obviously was prejudiced by lack of counsel in two respects at least. Counsel might well have urged and obtained a ruling that the narcotics case should be tried first;[19/] he no doubt would have sought an order to have appellant sent to St. Elizabeth's for an appropriate mental examination and to have the trial deferred until this could be done.[20/]

19/ The trial court, at the time of sentencing in the assault case, was troubled because the narcotics case had not yet been tried. (Tr. Sentence Proceedings 1-6.)

20/ It is no answer to this point that, after the lapse of 61 days, appellant's appointed counsel in the narcotics case on June 26 moved for and on July 2 obtained an order

The conclusion is clear - appellant was denied his constitutional right under the Sixth Amendment by the Court's failure to give him the assistance of counsel at his arraignment. For this reason alone, his conviction should be reversed and the indictment dismissed.

III

FAILURE TO AFFORD APPELLANT THE ASSISTANCE OF ASSIGNED COUNSEL FOR A PERIOD OF 67 DAYS WAS A DENIAL OF THE SIXTH AMENDMENT GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL AND HAD THE EFFECT OF DENYING HIM A SPEEDY TRIAL.

Not until 67 days after the alleged assault (42 days after arraignment) was appellant afforded the assist ; of counsel in this case. The preliminary hearing during which the alleged assault occurred was April 1, 1963, after which appellant was committed to District of Columbia Jail (Rec.). On April 22, 1963, indictments were returned on the assault and narcotics charges (Rec.). Counsel was first assigned to appellant in the assault case on May 6, 1963 (Rec.). On June 7, 1963, the court entered a new

---

20/ (continued) for appellant's mental examination and the trial was deferred until after the report from St. Elizabeth's had been received (Rec.). During this unnecessary delay, appellant languished in jail.

order in which it stated that it had learned that counsel appointed on May 6 was unable to appear and defend appellant on the assault indictment; and the court thereupon vacated its prior order and appointed other counsel (Rec.). On October 23, 1963, 205 days after the alleged assault, the appellant was brought to trial.

The appellant does not argue that he was denied a speedy trial solely by the aggregate time lapse between the alleged assault and trial. This Court has made it clear that a delay between offense and indictment[21/] or offense and trial[22/] will not constitute an unreasonable delay where there is a valid reason for such delay and the delay is not "arbitrary, purposeful, oppressive or vexatious."[23/] However, the determinative delay here was the 67 days between the alleged assault and appointment of counsel while appellant was in jail during the entire 67-day period of that delay. The crucial period between arrest and the weeks following are the most important in the preparation of an accused's defense. If an accused by reason of his indigency is not afforded counsel during this crucial period, he is greatly disadvantaged and inherently prejudiced.

21/ Smith v. United States, 118 U.S. App. D.C. __, 331 F. 2d 784 (1964).

22/ Nickens v. United States, 116 U.S. App. D.C. 338, 323 F. 2d 808 (1963).

23/ Marshall v. United States, __U.S. App. D.C. ___, 337 F. 2d 119 (1964).

In the trial of this case, one of the Government's chief witnesses, Officer Moore, stated in response to several important questions by counsel for appellant that he could not recall what occurred at the time of the alleged offense (Tr. 20, 21-22). If counsel had been appointed shortly after appellant's alleged assault, he could have interrogated witnesses when their memories were fresh. Appellant's inability to have this assistance was highly prejudicial.

Of especial significance in the present case is the language used by Judge Wright in a concurring opinion in Nickens v. United States, supra, in which the Court found that the appellant had not been denied a speedy trial. Judge Wright discussed the situation in which a defendant finds himself when complaint or indictment or arrest is purposefully delayed, saying:

> ". . .With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors." 323 F. 2d at 813.

In this case, the appellant, in jail and without counsel, may have guessed or even known that criminal charges were

being prepared against him but this did not avail him. In the words of Judge Wright, his memory and that of other persons grew dim with the passage of time and with each day the accused became less able to make out his defense.

Attorney General Robert F. Kennedy, testifying on May 22, 1963, before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, in support of proposed legislation with respect to the legal representation of indigents, put the case in this language:

> ". . .Federal courts today continue to delegate the defense of the underprivileged to assigned counsel. . .
>
> * * * * * * * *
>
> "They are not appointed until long after arrest when witnesses have disappeared and leads grown stale."

The breadth of the constitutional right "to have the Assistance of Counsel" has been under continuing examination by the Supreme Court since Powell v. State of Alabama, supra, in which the Court stated:

> ". . .All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold

> otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" 287 U.S. at 68-69, 71-72. (Emphasis supplied.) 24/

In Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), the Supreme Court clearly recognized the principle that counsel for an indigent defendant must be appointed in sufficient time to afford full opportunity for the preparation of the defense with the same care as that which the Government devotes in preparing the prosecution and which the defendant who has funds with which to hire counsel expends in preparing his defense:

> ". . .In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some

24/ In Mitchell v. United States, 104 U.S.App.D.C.57, 259 F.2d 787, 789-790 (1958), this Court pointed out that the adjective "effective" in "effective assistance of counsel" came into the law in the Powell case and cited decisions subsequent to Powell in which the meaning of effective assistance of counsel was discussed.

> countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." 372 U.S. at 344. (Emphasis supplied.) 25/

Justice Black, speaking for the Court in Gideon, recalled Powell in these words: ". . .While the Court at the close of its Powell opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. . . ." 372 U S. at 343.

If counsel had been appointed for the appellant on the assault charge, on or shortly after April 1, 1963, the day of the alleged assault, a motion for mental examination could have been made at that time and, if granted, such examination would have been more contemporaneous and valid with respect to the alleged assault. Appellant's disturbed state of mind at the time of the preliminary hearing is one of the factors which made it most essential that he have the assistance of counsel at the earliest possible time.

25/ See also MacKenna v. Ellis, 280 F.2d 592 (5th Cir.1960); Maye v. Pescor, 162 F.2d 641 (8th Cir. 1947); United States v. Germany, 32 F.R.D. 421 (M.D.Ala.1963). For cases dealing with the right to compel the attendance of witnesses, see Greenwell v. United States, 115 U.S.App.D.C. 44, 317 F. 2d 108 (1963); United States v. Seeger, 180 F.Supp. 467 (S.D.N.Y. 1960). "The right to counsel is not formal, but substantial." Johnson v. United States, 71 U.S.App.D.C. 400, 110 F. 2d 562, 563 (1940).

Courts in the District of Columbia have a special duty to set a high standard with respect to procedural safeguards in criminal cases. As Judge Edgerton noted in Jones v. United States, ___U.S. App. D.C.___, ___F.2d___, (Nos. 17688 and 17690, July 16, 1964)(slip opinion at 11):

> ". . .The 'Court, in its decisions, and Congress, in its enactment of statutes, have often recognized the appropriateness of one rule for the District and another for other jurisdictions so far as they are subject to federal law.' Griffin v. United States, 336 U.S. 704, 712 (1949). The courts of the District of Columbia should not content themselves with enforcing the minimum standards which the Constitution requires. They should also set for the Nation an example of respect for the rights of citizens."

The language of Gideon and of cases subsequently decided by the Supreme Court and by this Court lead to the inevitable conclusion that the indigent criminal defendant is entitled to the Sixth Amendment's guarantee of effective "Assistance of Counsel for his defence" in the preparation as well as in the presentation of his defense.[26/]

26/ Judge Fahy noted, in his dissenting opinion in John W. Jackson, Jr. v. United States, ___ U.S. App.D.C. ___, 337 F.2d 126, 134:

> "In the case at bar the circumstances we have outlined bring it within the exclusionary rule illustrated by the decisions cited. To have had a reasonable opportunity to adopt a course of conduct which would not prejudice his defense appellant needed utterly the assistance of counsel when called upon by the officers to respond to the charge of responsibility for the death of Mr. Lee. If his ensuing confession is used at his trial appellant loses the benefit of counsel for so much of his trial as brings before the jury the self-incriminating statements elicited at the Detention Headquarters when he was without counsel or the advice of counsel. To admit such statements throws the trial back, as it were, to the room where the statements were made, whereas the Constitution calls for the trial in a 'court-by all the procedural safeguards of the law.'"

In Escobedo v. State of Illinois, __U.S.__, 84 S.Ct. 1758 (1964), Mr. Justice Goldberg, speaking for the Supreme Court, fully acknowledged the vital importance of the events which precede the trial in the following language:

> ". . .The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.' In re Groban, 352 U.S. 330, 344, 77 S.Ct. 510, 519, 1 L.Ed. 2d 376 (BLACK, J., dissenting). 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at trial."' Ex parte Sullivan, D.C., 107 F.Supp. 514, 517-518." 84 S.Ct. at 1763.

To the same effect, see Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 1202 (1964).

Many of the recent decisions which have discussed the problem of the right to counsel at pre-trial stages of the proceedings have involved confessions. An inadmissible confession is a tangible result of the lack of counsel to the defendant in the early stages of the proceedings against him. Clearly it is only one of the many prejudicial factors which may irretrievably affect the result of the defendant's trial.

Whether a confession is elicited from a defendant or whether he is prevented from employing all the means available for his defense by reason of the late appointment by counsel, the end result is the same. The facts and circumstances in this assault case and the related narcotics

case are inextricably intertwined. They all point up to the necessity of having counsel appointed early in any criminal proceedings against an accused person.

The Escobedo and Massiah decisions are unmistakable in documenting the spirit with which the Supreme Court today treats with the problem of preserving the constitutional right of every criminal defendant to a fair trial.[27/]

27/ This concept was well stated in 1961 by Prof. William Merritt Beaney, an eminent authority on the right to counsel, in words which clearly forecast such decisions as Gideon and Escobedo:

"[W]hat is argued here is that the delay in itself is a serious element of unfairness, a proposition that can be tested by asking what would be the reaction of any defendant with means to retain counsel and what would be his counsel's attitude if he were forced to forego the privilege or representation until a week or more had elapsed? This basic unfairness may permeate many trials but without resulting in the kind of tangible evidence of impropriety needed under the 'fair trial' rule. The possible defense witness who is never found, the prosecution witness' story that might have been different if the defense had obtained an early interview, suggest the range of various 'might have been' factors aiding the defense which are eliminated by the tardy appointment of counsel, and when an appellate court determines that a trial is not lacking in fundamental fairness it must of necessity overlook the possible unseen harm of this nature suffered by the defendant. Only if the defense has an opportunity to prepare for trial substantially equal to that enjoyed by the prosecution can a criminal proceeding be considered fair in any realistic sense. This in turn means that counsel, whether retained or appointed, must have access to the accused soon after arrest." Beaney, Right to Counsel Before Arraignment, 45 Minn. L.Rev. 771, 780-81 (1961).

In Escobedo, Mr. Justice Goldberg said that "[n]o system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these [constitutional] rights." 84 S. Ct. at 1764. In so saying, he referred to the Report of Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963) and set forth the following from that report (pp. 10-11):

> "The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. ***Persons [denied access to counsel] are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss to the interests of accused individuals, occasioned by these failures, are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that [this situation is] detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community."

The factual situation in the Escobedo case and the language used by the Supreme Court in reaching its decision would appear to make certain a holding that the appellant has been deprived of fundamental rights. In Escobedo, the burden of the Court's finding was that Escobedo was denied "the assistance of counsel" when the inquiry had

focused on him and the police took him into custody and carried on a process of interrogation in an effort to elicit a confession in the absence of accused's counsel. Escobedo, however, was in a far more favorable position than was this appellant. Counsel had been retained for Escobedo and, as a matter of fact, he understood, from a hand wave by his counsel, that his lawyer didn't want him to say anything to his police interrogators and wanted to talk to him. Id., 84 S. Ct. at 1760, n.1. Let us compare Escobedo's situation with that of appellant's here.

With respect to the assault case, the inquiry focused on this appellant when he struck Officer Moore at the preliminary hearing. From that point on, the appellant was the focus of the inquiry for the crime for which he was ultimately tried and convicted.

The failure to provide counsel for appellant shortly after the alleged assault deprived him of his right to the effective assistance of counsel. The delay in the appointment of counsel had the attendant effect of depriving appellant of his right to a speedy trial, as no trial thereafter could erase or undo the previous unwarranted and prejudicial delay. Under the circumstances of this case, the only appropriate remedy is a reversal of the conviction and dismissal of the indictment.

All of the reasons set forth in this Argument III make clear the irreparable prejudice which occurred prior to applicant's trial and which rendered that trial, or any trial subsequent to the occurrence of the prejudice, unfair and a violation of due process.

IV

THE FAILURE TO AFFORD THE ASSISTANCE OF COUNSEL TO THE INDIGENT ACCUSED DURING HIS PRELIMINARY HEARING IN THE NARCOTICS CASE AND UNTIL AFTER HIS ARRAIGNMENT IN THIS CASE WAS A DENIAL OF EQUAL PROTECTION OF THE LAWS.

The indigent appellant was unable to retain counsel, and did not have assigned counsel, (1) at the preliminary hearing in the narcotics case where the alleged assault, appealed here, occurred, (2) after the alleged assault when he was imprisoned in D.C. Jail, and (3) at his arraignment.

To deny counsel to this appellant in the circumstances of this case was an "invidious discrimination" between the rich and the poor violating the due process clause of the Fifth Amendment and denying him the equal protection of the laws.

Rule 5(b) of the Federal Rules of Criminal Procedure in its present form requires the Commissioner to

inform the accused, among other things, "of his right to retain counsel," and further to "allow the defendant reasonable time and opportunity to consult counsel."

Rule 44 of the Federal Rules of Criminal Procedure as now written and the Advisory Notes to that Rule are to this effect:

> "The rule is intended to indicate that the right of the defendant to have counsel assigned by the court relates only to proceedings in court and, therefore, does not include preliminary proceedings before a committing magistrate. Although the defendant is not entitled to have counsel assigned to him in connection with preliminary proceedings, he is entitled to be represented by counsel retained by him, if he so chooses, . . ." 18 U.S.C.A. Rule 44, Notes of Advisory Committee on Rules, n.2.

To permit defendants to be represented by retained counsel at the preliminary hearing but to refuse to assign counsel for the hearing is an "invidious discrimination" between the rich and the poor which violates the Fifth Amendment's due process clause and denies the equal protection of the laws. Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585 (1956). See also Hardy v. United States, 375 U.S. 277, 84 S. Ct. 424 (1964); Lane v. Brown, 372 U.S. 477, 83 S. Ct. 768 (1936); Coppedge v. United States, 369 U.S. 438, 82 S. Ct. 917, 921-22 and cases cited at n. 13 (1962).

A defendant in a criminal case in the District of Columbia is plainly entitled to the equal protection of the laws.[28/] Any doubt as to the validity of this proposition was resolved in Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693 (1954):

> ". . .The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." Id., 347 U.S. at 499.

The provision in Rule 5(b) that the defendant in a criminal case shall have a right to retain counsel and to have time to secure advice from counsel is a patent admission that the aid and advice of counsel is critical at this, the first, accusatorial stage of the proceedings. If, then, the advice of counsel is essential at the preliminary hearing, and provision is made only for

---

28/ See the discussion of this problem in Ricks v. United States, 334 F.2d 964, at n. 2 and Blue v. United States, supra, at 9 n.6 (slip opinion). See also the Advisory Committee's Note, 34 F.R.D. 443 (1964), and articles and cases discussed therein.

the advice of retained counsel, it is a clear denial of the equal protection of the laws not to afford counsel to indigent defendants, such as this appellant, who are unable to retain counsel, but who are equally in need of the advice of counsel.

The holding in Griffin v. Illinois, supra, sets out the mandate of the United States Supreme Court that no distinction shall be made between the rich and the poor where procedural safeguards of an accused are concerned. In holding that an indigent defendant must not be denied a copy of the trial record for purposes of appeal because he could not pay for it, Justice Black said:

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem, People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: . . .In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system - all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' . . .
>
> "Surely no one would contend that either a State or the Federal Government could constitutionally

> provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. . . ." 351 U.S. at 16-18. (Emphasis supplied.)

So here, the ability to pay for counsel has no rational relationship to the need for legal assistance by the accused and if the rich may have counsel at the preliminary hearing so too must the poor.

This Court recently recognized in Washington v. Clemmer, supra. that those rights at a preliminary hearing which are afforded to defendants able to pay for them must not be denied to those unable to pay for them merely because they are poor. The ruling of this Court in dealing with the request to have a reporter present at the preliminary hearing and to subpoena witnesses is equally pertinent to the need for assigned counsel:

> "We also think this course is required by minimal standards of fair and equal justice.

> Defendants who have funds are entitled to employ their own reporters. To deny this opportunity to an indigent defendant would be to permit invidious discrimination based on wealth. Furthermore, since the Government may have a reporter at the hearing, the accused must be afforded the same right in order to meet the requirements of fundamental fairness."
>
> * * * * * * *
>
> ". . .Whatever procedures are worked out, of course, must be such that no barriers are faced by the indigent accused in the securing of witnesses that are not faced by the wealthy." Id., at 4-5, 6-7 (slip opinion, May 11, 1964).

Under our system of equal justice for all, a rule which permits counsel prior to trial for an accused who can afford to hire a lawyer but denies counsel to one who is without funds constitutes the rankest form of discrimination and should be struck down.

CONCLUSION

The appellant was deprived of his rights under the Constitution to the effective assistance of counsel, to a speedy trial, to fundamental due process and to the equal protection of the laws, as well as to his rights under the 1960 Legal Aid Act for the District of Columbia prior to his trial.

Although there were certain prejudicial errors at the trial as regards the insanity defense, these points are not raised in this appeal, because they relate to the issue of a new trial. To require appellant, in the circumstances of this case, to face the hazards of a new trial would be most unjust to him, as he has already served his full time in jail on the assault conviction.

Accordingly, appellant submits that his conviction should be reversed and the case remanded with directions to vacate the judgment of conviction and to dismiss the indictment.

Respectfully submitted,

/s/ Andrew W. McThenia, Jr.
Andrew W. McThenia, Jr.

711 Princess Street
Alexandria, Va.

/s/ Newell A. Clapp
Newell A. Clapp

/s/ Bernard M. Beerman
Bernard M. Beerman

1144 Pennsylvania Building, N.W.
Washington, D. C. 20004

Counsel for appellant appointed by this Court

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been hand-delivered to the attorney for appellee: The United States Attorney at the United States Courthouse, Constitution Avenue and John Marshall Place, Washington, D. C., this 18th day of January, 1965.

/s/ Bernard M. Beerman
BERNARD M. BEERMAN

Court-Appointed Attorney for
Oscar Dancy, Appellant

1144 Pennsylvania Building
Washington, D. C. 20004

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,366
18,716

OSCAR DANCY, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT X. PERRY,
HAROLD H. TITUS, JR.,
JOHN R. KRAMER,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Should appellant's assault and narcotics convictions be reversed and the underlying indictments be dismissed for failure of the Commissioner to inform appellant at his preliminary hearing on the narcotics charges of the availability of assigned counsel, where appellant had a preliminary hearing at his own request at which he had unlimited opportunity to establish lack of probable cause and to learn in advance of trial the foundations of the charge and the evidence comprising the Government's case against him, at which he did not incriminate himself in any way, although he did strike a testifying officer, giving rise to the assault charge, and at which he waived no possible defenses?

(2) Should similar relief be granted because of appellant's lack of counsel at arraignment where pleas of not guilty were entered for him, resulting in no prejudice whatever to the effective presentation of his defense at his trials?

(3) Was appellant denied a fair trial on the narcotics charge where appellant's counsel failed to raise the defense of insanity in light of two hospital reports and one jury verdict running directly contrary to that defense and where the trial court failed to consider the defense sua sponte and thrust the defense upon an unwilling defendant?

INDEX

TABLE OF CASES

Cases—Continued — Page

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18366 and 18716

OSCAR DANCY, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted, tried by jury, convicted, and sentenced to imprisonment for a period of forty-five days to six months on one count of assault on a member of the police force in violation of 22 D.C.C. § 505 (a). The appeal in No. 18366 followed.*

* Appellee directs the Court's attention to its motion to dismiss this appeal as moot, filed January 27, 1965. This appeal will henceforth be referred to as the assault case and the transcript therein as Assault Tr. The appeal in 18716 will be called the narcotics case with the transcript termed Narc. Tr.

Appellant was indicted, tried by jury, convicted, and sentenced to imprisonment for a period of ten years on one count of selling a narcotic drug not in pursuance of a written order in violation of 26 U.S.C. § 4705 (a), five years on one count of selling a narcotic drug not in or from the original stamped package in violation of 26 U.S.C. § 4704 (a), and ten years on one count of facilitating the concealment and sale of a narcotic drug with knowledge that the drug had been imported into the United States contrary to law in violation of 21 U.S.C. § 174, all three sentences to run concurrently. The appeal in No. 18716 followed.

Pre-trial Chronology

1963—February 4—Appellant arrested on a robbery charge, Crim. No. 263-63.

February 5—Appellant incarcerated on robbery charge after presentment. Interview with Detective Fogle of Narcotics Squad (Narc. Tr. 144-149).

February 12—Counsel appointed to represent appellant on robbery charge. Preliminary hearing held with appellant committed to D. C. Jail to await grand jury action.

March 15—Arrest warrant on narcotics charge issued.

April 1—Appellant served with warrant of arrest on narcotics charge. Taken before United States Commissioner Samuel Wertleb. Commissioner advises appellant of his rights in accordance with Rule 5 (b), F.R. Crim. P. and of his right to cross-examine witnesses against him and introduce evidence in his own behalf in accordance with Rule 5 (c), F.R. Crim. P. after appellant requests a preliminary hearing then and there (Assault Tr. 38). The record does not show that appellant was informed that he could have counsel assigned to represent him. Hearing held with probable cause shown by testimony of

narcotics officer Rufus Moore of sale of narcotics on December 7, 1962, by appellant to special employee Atria Harris to which Moore was a witness. Appellant smacks his fist on table and leaves hearing room during Moore's direct testimony, but returns and apologizes to the Commissioner. Further aggravated by Moore's repetition under cross-examination of his certainty that appellant was the narcotics salesman on December 7, 1962, appellant grabs and hits Moore (Assault Tr. 6-7, 23-24, 33-36, 77-80). Appellant committed to D. C. Jail to await grand jury action with bond set at $3,500.

April 22—Two indictments filed charging appellant with assault and narcotics violations.

April 26—Appellant appears before McGuire, C.J. for arraignment. Appellant tells court that he does not want an attorney, does not intend to get one, does not intend to enter any pleas, and does not want to do anything. Judge orders pleas of not guilty to be entered in each case and directs that counsel be appointed to represent appellant (Supp. Rec. on Appeal, pp. 2-3).

May 3—Counsel appointed for appellant on narcotics charge.

May 6—Counsel appointed for appellant on assault charge.

June 7—Appointment of new counsel in assault case.

June 12 and 13—Counsel on assault charge moves for continuance of trial date to allow him to prepare. Motion granted by McGuire, C. J.

June 26—Counsel in narcotics case files motion for mental examination of appellant with supporting history.

July 2—Motion for mental examination to determine competency and sanity granted and made applicable to both cases by McLaughlin, J. Appellant committed to St. Elizabeths Hospital for 90 days.

October 8—St. Elizabeths' Superintendent Dale C. Cameron files letter dated September 27, advising court that examination reveals appellant to be competent to stand trial and to have been suffering from no mental disease or defect on December 7, 1962 or on April 1, 1963.

October 23-25—Trial on assault charge with verdict of guilty.

November 19—Appellant moves for appointment of new counsel in narcotics case and for lie detector test. Latter motion denied by Keech, J.

November 20—New counsel appointed with order by Keech, J. giving new counsel sufficient time to prepare for trial. (Order granted prior to beginning of trial because of appellant's courtroom behavior.)

December 13—Motion for lie detector test denied by McGuire, C.J.

1964—January 3—Motion for lie detector test denied by McLaughlin, J.

January 10—Appellant sentenced and committed on assault charge.

January 28—New mental examination ordered by McGarraghy, J. at outset of trial with consent of counsel. Appellant committed to St. Elizabeths for 90 days.

March 26—Letter filed from Dr. Cameron advising that appellant is competent to stand trial.

May 1—Appellant moves to dismiss counsel.

May 8—Motion to dismiss counsel denied.

May 13—Trial begins on narcotics charge.

Assault Trial

Officers Rufus Moore and Bertram Fogle of the Narcotics Squad as well as United States Commissioner Samuel Wertleb testified to the episode during appellant's preliminary hearing on the narcotics charge when appel-

lant, in the course of cross-examining Moore with respect to Moore's identification of him, jumped from his seat at counsel table, came over to where Moore was sitting, and struck Moore several blows in the face and side of the neck as well as kicking Moore in the left side or leg as Moore attempted to get away from him (Assault Tr. 6-8, 13, 21, 23-25, 33-37). Appellant admitted that he had hit Moore, although he was not sure whether or not he had kicked him (Assault Tr. 77-80). He know Moore was a police officer (Assault Tr. 77).

The sole defense was insanity in the form of irresistible impulse and/or for a sociopathic personality bringing about the admitted assault (Assault Tr. 15-16, 67, Opening Statement for Appellant 5-6, Closing Argument for Appellant 11, 13). Appellant testified that he had been using drugs since 1947 (Assault Tr. 82), that he acted on impulse in striking Moore since he was mad at Moore for not telling the truth (Assault Tr. 93, 96-97), that, although he had been in jail all of his life since the age of eleven, no one had ever given him any help (Assault Tr. 94-95, 97). He felt that no one, with the exception of his common law wife, Marion Whitney, had ever tried to get close to him and find out what made him tick (Assault Tr. 91-92).

Miss Whitney had known appellant since 1947 (Assault Tr. 41). She believed that he was mentally sick, a paranoid or schizophrenic (Assault Tr. 44, 48-49, 61). She recountered several occasions on which he had grabbed her on her stomach and hurt her, but laughed when she hollered in pain (Assault Tr. 45-48, 51). He wouldn't mingle with people and felt they were against him (Assault Tr. 49).

Unlike Miss Whitney who never had any psychiatric training or taken any courses on the subject (Assault Tr. 62), the Government's witnesses on the sanity issue were trained practising psychiatrists at St. Elizabeths. Dr. Mauris Platkin, who had been on the staff for eight years, and Dr. Charles Agler, who had been there for over a year, both agreed that appellant had no mental disorder

on April 1, 1963 nor was he suffering from an irresistible impulse at the time of the assault (Assault Tr. 109, 126, 140). Both were aware that appellant had been previously diagnosed as a sociopath, but they did not so conclude after the staff conference on September 25, 1963, during which they interviewed appellant and evaluated the various physical and mental reports made on and tests given to appellant (Assault Tr. 105-108, 142-146, 152).

Narcotics Trial

Atria Harris, a special employee assisting Officer Rufus Moore in undercover narcotics investigations, testified that on December 7, 1962, while in the company of Officer Moore, he saw appellant on the sidewalk in the 1900 block of Fourteenth Street, Northwest (Narc. Tr. 3, 4, 7). They approached appellant, and Harris asked him whether he "was sticking," *i.e.*, did he have any narcotics. Appellant replied that he had a twelve dollar bag and invited them to walk with him. When they were some thirty to forty paces west of Fourteenth Street and T Street, appellant stopped, looked around, and inquired what Harris wanted. He reached in his pocket and gave Harris the one bag (actually a small glassine envelope) Harris asked for out of a little stack of bags, charging Harris twelve dollars for the bag, which Harris paid with police funds. Harris had produced no written order form, seen no tax stamp on the package from which the bag was taken or on the bag itself. Harris took the bag and turned it directly over to Officer Moore, who had been standing next to him during the entire transaction. He and Moore turned around, left appellant, and went back to Moore's car (Narc. Tr. 7-10, 12-13). Moore corroborated all of these details (Narc. Tr. 30-36).

The only disagreement between the two occurred with respect to the marking of the evidence. Harris stated that he had placed his initials on the bag when they were in the car before Moore placed the bag inside Government's Exhibit 1-A, a small manila envelope, which Harris signed (Narc. Tr. 11-12, 17-18). Moore had tendered him both

bag and envelope for marking (Narc. Tr. 25). Harris was able to identify the contents of the manila envelope, *i.e.*, the bag appellant had sold him (Narc. Tr. 11). Moore stated that, when he reached his car and had driven several blocks away, he took a small, cream-colored envelope (Government's Exhibit 1-A) from the trunk, had Harris sign it and initial the bag containing the white powder, and then placed the bag inside the envelope (Narc. Tr. 34-35, 37, 51-56). On cross-examination Moore noted that, although the manila envelope bore Harris' signature, the glassine bag did not contain Harris' initials on its surface (Narc. Tr. 53-56). Moore believed Harris had marked the bag, since that was the procedure normally followed, but apparently that had not been done in this case (Narc. Tr. 53-56). Moore was nonetheless certain that the glassine bag in court was the same bag he received from Harris on T Street, performed a preliminary field test on, and transmitted to Detective Irvin Brewer of the Narcotics Squad inside the manila envelope on December 10, 1962 (Narc. Tr. 57-59).

Detective Brewer testified that he recognized the bag and the envelope as the same ones transferred to him by Moore on December 10 (Narc. Tr. 75-76). He initialed both exhibits and placed them in an even larger envelope, Government Exhibit 1 (Narc. Tr. 76-77), which he turned over to Dr. William Butler in sealed state for chemical analysis (Narc. Tr. 78). Dr. Butler testified that he had tested the white powder contained in the glassine envelope and found it to contain heroin hydrochloride weighing 140 miligrams mixed with other substances (Narc. Tr. 91-92).

Appellant took the stand after his motion for a judgment of acquittal was denied (Narc. Tr. 104) and denied that he had seen Harris before January or February 1964, or Moore before April 1, 1963 (Narc. Tr. 168-170). He further denied that he had participated in any sale of narcotics in December of 1962 (Narc. Tr. 171-172). Appellant attempted to bolster his categorical denial of the charges by testimony from Charles Scott, who had been

arrested and jailed with him on a robbery charge in February 1963, that on February 5, 1963, during the course of a conversation between appellant and Detective Bertram Fogel of the Narcotics Squad to which Scott had been privy, Fogel had informed appellant that his record was clean as far as the Narcotics Squad was concerned (Narc. Tr. 144-149). Detective Fogel stated that he told appellant that there were no narcotics charges pending against him as of that date (Narc. Tr. 128), which was, indeed, the fact.

Appellant renewed his motion for a judgment of acquittal, only to have it again denied (Narc. Tr. 201).

CONSTITUTIONAL PROVISIONS, STATUTE AND RULES INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rule of Criminal Procedure 5(b),(c):

> "(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statements made by him may be used against him. The commissioner shall allow the defendant reasonable time and

opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

"(c) *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

Federal Rule of Criminal Procedure 44:

"*Assignment of Counsel.* If the defendant appears in court without counsel, the court shall advise him of right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

The Code of the District of Columbia, Title 2, § 2202:

"§ 2-2202. Counsel for indigents to be provided in criminal proceedings and proceedings of a criminal nature.

"The Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases, and in cases involving offenses against the United States in which imprisonment may be for one year or more in the Municipal Court for the District of Columbia, in proceedings before the Coroner for

the District of Columbia and the United States Commissioner, in proceedings before the juvenile court of the District of Columbia, and in proceedings before the Commission on Mental Health of the District of Columbia and proceedings in the courts arising therefrom.

"The Agency shall from time to time advise each of the courts and tribunals named in this section of the names of the attorneys employed by the Agency who are available to accept assignments in said court or tribunal. The judges or other presiding officers of the several courts and tribunals may assign attorneys employed by the Agency to represent indigents, such assignments to be upon a case-to-case basis, a group-of-cases basis, or a time basis, as the assigning authority may prescribe. Each such court and tribunal will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable."

SUMMARY OF ARGUMENT

I

Appellant is not entitled to reversal of his convictions on the assault and narcotics charges nor to dismissal of the indictments because the Commissioner neglected to notify him at his preliminary hearing on the narcotics charge that assigned counsel was available.

Appellant, at his own insistence, was given a preliminary hearing, albeit without representation, at which he had an unfettered chance to challenge probable cause to hold him on the charge and to learn prior to trial all of the facts upon which the charge was predicated through the testimony and cross-examination of the Government's main witness, at which he did not incriminate himself in the slightest, although he did attack the officer-witness and thereby commit the crime of assault on a police officer in the Commissioner's presence, and at which he did not foreclose himself from raising any defenses at trial.

II

Appellant is not entitled to reversal and dismissal of the convictions and indictment, respectively, because of his lack of counsel at his arraignment on the charges since pleas of not guilty were entered for him and the effective presentation of his defenses (instantly and general denial) at his trials suffered not at all.

III

Appellant was not denied a fair trial on the narcotics charge because his attorney did not raise the insanity defense since that tactical decision was wise, not incompetent, in light of two hospital reports negating mental illness (the first of which counsel had taken the initiative in requesting, despite appellant's unwillingness to be examined), a jury rejection of an even stronger insanity defense in the assault case, and the availability of the promising defense of general denial that would be jeopardized by a claim of insanity. Nor was he denied a fair trial because the trial court failed to consider the defense sua sponte, since *Lynch* v. *Overholser*, 369 U.S. 705 (1962) forbids the court's thrusting that defense upon a defendant disinclined to use it for himself.

ARGUMENT

I. Appellant's lack of counsel at his preliminary hearing on the narcotics charge does not warrant reversal of either the narcotics or the assault convictions or dismissal of the indictments.

(Assault Tr. 32-34, 77-80, 95, 102; Nar. Tr. 77-78, 111, 121, 130, 144-145, 170-172).

Appellant should have been informed by the United States Commissioner at the time of his preliminary hearing on the narcotics charge on April 1, 1963 that, if he desired a lawyer but was unable to retain one, the Commissioner could assign counsel to represent him. *Blue* v.

United States, No. 18, 401, decided October 29, 1964, interpreting 2 D.C.C. § 2202, the District of Columbia Legal Aid Act.[1] Granted that the Commissioner in this instance did not perform his statutory duty of notifying appellant of the availability of unpaid counsel prior to conducting the hearing, what should be the consequences?

Appellant, like Blue, suggests that both the narcotics and the assault indictments should be dismissed, granting him immunity from any further prosecution on these charges. Appellant, like Blue, deserves neither this remedy nor the lesser alternative of reversal and remand for a new trial. Rather the convictions below should be affirmed, since the defects in the Commissioner's pre-trial proceedings were academic and resulted in no harm to appellant's ability to defend himself at his trials.

Nothing appellant said or did at the preliminary hearing was used against him during the trial of the narcotics case. None of his Fifth Amendment rights were in any way jeopardized by his failure to have appointed counsel by his side. See *Bettis* v. *District of Columbia*, D. C. Ct. App. No. 3611, decided January 26, 1964. Compare *White* v. *Maryland*, 373 U.S. 59 (1963) (uncounselled guilty plea at preliminary hearing) and *Wood* v. *United States*, 75 U.S. App. D.C. 274, 128 F.2d 265 (1942) (uncounselled guilty plea at preliminary hearing) with *Saunders* v. *United States*, 114 U.S. App. D.C. 345, 316 F.2d 346 (1963) (uncounselled inculpatory statement while cross-examining complainant); *Nance* v. *United States*, 112 U.S. App. D.C. 38, 299 F.2d 122 (1962)

---

[1] In light of the interpretation given by this Court in *Blue, supra*, to the Legal Aid Act there is no longer any question in his jurisdiction as to the existence of invidious discrimination between defendants who can afford to retain counsel and those who cannot which might require either broadened construction of Rule 5(b), Fed. R. Crim. P. in conjunction with Rule 44, Fed. R. Crim., P. and its Advisory Note or a holding that those rules are unconstitutional in light of the Due Process clause of the Fifth Amendment. *Blue, supra*, slip opinion at pp. 8-9. See *Ricks* v. *United States*., —— U.S. App. D.C. ——, 334 F.2d 964, 966-967 n. 2 (1964). Appellant's fourth question presented in each appeal has, therefore, been mooted.

(uncounselled inculpatory statement while cross-examining complainant), and *Mumforde* v. *United States*, 76 U.S. App. D.C. 107, 130 F.2d 411, *cert. denied*, 317 U.S. 656 (1942) (uncounselled plea of not guilty as charged, but guilty of constituent offenses).

Appellant's lack of counsel at his preliminary hearing had no critical impact or, indeed, any impact whatsoever upon his ability to assert all the defenses he wanted to before or during trial. Under Rule 12(b), Fed. R. Crim. P. no defenses are waived by failure to raise them at the preliminary hearing stage, which, therefore, is not a "critical stage" in this federal jurisdiction in the sense in which the Supreme Court employed that phrase in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (Alabama rules make arraignment a "critical stage" because of the possibility of the irretrievable loss of such unasserted-at-that time defenses as insanity or racial discrimination in jury selection).

Appellant, unlike Blue, actually had a preliminary hearing on the narcotics charge at his own request, thereby eradicating any issue of infected waiver or of the need to supply an omitted hearing. Appellant may have been unrepresented at the hearing, but that does not per se prevent the dual purposes of a hearing set forth in *Blue*, *supra*, from being fully satisfied. He had an opportunity in cross-examining Rufus Moore, the undercover officer who was a witness to the transaction in question, to persuade the Commissioner that there was no probable cause to detain him on the narcotics charge, although he could not have secured his liberty had he been successful in this endeavor since he had been detained in jail since February 5, 1963 on a robbery charge (Assault Tr. 95, 102; Narc. Tr. 144-145). That he failed to convince the Commissioner that the narcotics charge was unworthy cannot be attributed to the fact that he conducted cross-examination without the aid of an attorney, for when he went to trial on the very same charge with an attorney handling trial strategy, he was found guilty by twelve jurors. No lawyer could make a silk purse out of a sow's

ear by successfully challenging probable cause where guilt was shown beyond a reasonable doubt. *Blue, supra.*

Not only was appellant free to question the bases of the narcotics charge at his hearing, but also he was enabled "to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him." *Blue, supra,* slip opinion at p.13. Moore described the circumstances of the sale in the same detail he used at trial, including precise reference to date, hour, place, the nature of the conversation between appellant and Atria Harris, the special employee, and the steps involved in the sale (Assault Tr. 35-36; Narc. Tr. 77-78).

No claim is made here nor was there any suggestion at the narcotics trial that appellant was surprised by the introduction of certain testimony for which a hearing conducted by a lawyer might better have prepared him or that the effectiveness of his defense was undermined in any way by the lack of counsel at the preliminary hearing stage. Appellant was certainly not handicapped from availing himself of a general denial by learning from Moore the exact time and place of the alleged sale and the participants therein. At trial (as at the preliminary hearing) he steadfastly maintained that he never saw Moore in his life before April 1, 1963 and that he sold no narcotics to anyone in December of 1962 (Assault Tr. 78-79, Narc. Tr. 170-172). This was, as he admitted, the essence of his defense (Narc Tr. 111). His hearing helped, not hindered, his readiness to assert it. Compare *Blue, supra* (no showing of trial prejudice resulting from lack of hearing).

On the assault charge, unlike the narcotics one, appellant was not afforded any preliminary hearing. But it does not appear from the record that he sought corrective action either before or during trial. Nor does he advance any complaint seeking to fill this gap in the pre-trial proceedings on appeal. The reasons for his silence in this respect or obvious. A hearing would have been a gratuitous formality. The Commissioner himself was an eye-witness to the acts in question (Assault Tr. 32-34). Appel-

lant knew the identity of all the other persons present (Assault Tr. 77). He needed no crystal ball to guess what the Government's case-in-chief would consist of. He had no hope of regaining his liberty.

The thrust of appellant's objection to his uncounselled status at the preliminary hearing on his narcotics charge insofar as it affected the assault case is not that his ability to defend himself at the assault trial was impaired, for that contention is limited to his lack of counsel from April 1 on, not on April 1 itself. See II, *infra*. Rather appellant intimates that the crime of assault itself was a product of his failure to have two friendly restraining hands by his side ready to grab him at the first sign of any violent move. This contention that it is the function of an attorney to act as a crime-deterring guardian angel as well as an advisor after the fact is, as Justice White pointed out in *Escobedo* v. *Illinois*, 378 U.S. 478 at 497 (1964), reducing the Sixth Amendment to an absurdity. Appellant is solely responsible for his own emotional outbursts. It is not for this Court to speculate as to whether or not an attorney might have successfully strait-jacketed appellant's irresistible impulses (Assault Tr. 15-16) so as to avert any criminal acts, since no one has a right to a lawyer for that purpose.[2]

---

[2] It should be noted that, by his own admission, appellant already had appointed counsel representing him at the preliminary hearing on the robbery charge on February 12, 1963 (Assault Tr. 95, Assault Brief 18). Since that charge was still pending on April 1 (it was dismissed on April 30), appellant had at least one lawyer to whom he might have turned for guidance. Given appellant's total inability to get along with any attorney, which is so clearly reflected in the record of these cases containing two oral motions to dismiss counsel (November 19, 1963 and May 8, 1964; See also Narc. Tr. 110-111) and various informal indications of appellant's desire to take over his own case (Narc. Tr. 121, 130), it appears somewhat dubious that appellant would have sat still at his lawyer's direction while Moore lied to deprive him of his freedom. See appellant's outburst at the assault trial. (Assault Tr. 78-80). It is interesting in this connection to realize that appellant refused to co-operate with his appointed counsel in the narcotics case and informed him that he didn't want to be represented by or talk to anyone else (Affidavit Filed by John F. Burke, Esq. on June 26, 1963 in Connection With Motion for Mental Examination).

II. Appellant's lack of counsel at his arraignment on the assault and narcotics charges did not violate the Sixth Amendment.

(Assault Tr. 15-17, 67, 77-80, 108-111, 123-124, 140, 148-149, 153-154; Narc. Tr. 106-107, 144-149, 168-172, 174)

Appellant contends that the fact that he appeared at his arraignment on both charges unrepresented by counsel necessitates either dismissal of the indictments or reversal of his convictions for denial of his Sixth Amendment rights. The presiding judge ordered pleas of not guilty entered for appellant because of appellant's recalcitrant attitude and expressed desire not to co-operate in the progress of his cases (Supp. Rec. on Appeal 2-3). There is no constitutional requirement that an accused be represented by counsel at his arraignment in a federal jurisdiction under Rule 10, Fed. R. Crim. P. when a plea of not guilty is entered. *Council* v. *Clemmer*, 85 U.S. App. D.C. 74, 177 F.2d 22, *cert. denied*, 338 U.S. 880 (1949), and cases cited therein; *United States* v. *Stevenson*, 170 F.Supp. 315 (D.D.C. 1959). Compare *Hamilton* v. *Alabama*, *supra* (loss of certain defenses if not raised at arraignment stage in Alabama with intelligent plea in that jurisdiction incorporating counseled opportunity to assert all applicable defenses).

The April 26, 1963 arraignment had no more prejudicial impact on appellant's ability to protest his innocence at trial than did his pro se preliminary hearing—none whatever. Appellant argues that the twenty-five day counselless gap between preliminary hearing and arraignment coupled with the lapse of seven days from the arraignment until counsel was actually appointed in the narcotics case and ten days until he was assigned a lawyer in the assault case[2] resulted in severe prejudice to

---

[2] Appellant complains that the gap must be measured from April 1, 1963 to June 7, 1963 when new counsel was appointed rather than to May 6, 1963 when counsel was first appointed because the first lawyer appointed was actually unable to appear and defend him.

(cont'd p. 17)

his case consisting of his inability to have the narcotics case tried before the assault, his inability to obtain a mental examination relating to his sanity on December 7, 1962 and April 1, 1963 prior to July 2, 1963, his inability privately to interrogate witnesses against him so as better to prepare his defense, and his inability to fix in his own memory the happenings on the day in question.

The first indication from appellant that he wanted to have the narcotics trial precede the assault trial was during the course of the narcotics trial itself immediately after his motion for judgment of acquittal at the close of the Government's case-in-chief had been denied (Narc. Tr. 106-107). Although Judge Sirica had mentioned the speedy trial problem when sentencing appellant for the assault and requested that the lawyer in the assault case contact the lawyer handling the narcotics charge to ascertain the status of that charge (Tr. Sentencing Proceedings in Assault Case 4-5), appellant failed to raise the issue until May 14, 1964, at the mid-way point of trial after he had asked, some six days before, not for a speedy trial, but for appointment of different counsel and, presumably, were that request to have been granted, for a continuance for better preparation. Appellant can hardly be said to have asserted his right to a speedy trial promptly and, accordingly, he must be deemed to have waived it. *Smith* v. *United States*, —— U.S. App. D.C. ——, 331 F.2d 784 (1964); *James* v. *United States*, 104 U.S. App. D.C. 263, 264, 261 F.2d 381, 382 (1958), *cert. denied*, 359 U.S. 930 (1959) (defendant waited until day

---

Although the additional thirty-one days would have no effect on the merits of his position here, this Court has not and should not involve itself in the morass of overseeing assigned lawyer's conduct and dating a criminal's counselled state only from the day his appointed lawyer first works on the case rather than from the date of appointment. It is not to be assumed, as it must be in the absence of any indication in the record if appellant's method of calculating the elapsed time is to prevail, that appointed attorneys shirk their responsibilities and perform no services for their clients until forced to appear in court, particularly where the record does reveal a highly unco-operative client. See Affidavit filed by John F. Burke, Esq., on June 26, 1963 in connection with Motion for Mental Examination.

of trial and asked for appointment of new counsel); *United States* v. *Lustman*, 258 F.2d 475, 478 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958) (four-year delay).

The timeliness of this concern with the order in which the District Court disposes of its criminal docket is matched by its substantiality. Judge Sirica specifically declined to take the pending narcotics charge into account when sentencing appellant on the assault (Tr. Sentencing Proceedings in Assault Case 2). Appellant was quite properly not impeached in the course of his testimony in the narcotics trial by reference to the appealed assault conviction, although other convictions were used to affect his credibility (Narc. Tr. 174). While appellant was tried some thirteen months after indictment (April 22, 1963 to May 13, 1964), the Government was responsible for no part of this delay. Nearly all of it is attributable to appellant's own successful motions for mental examination (the second examination on January 28, 1964, was ordered with appellant's consent) and appointment of new counsel, all of which necessitated extensive delays of up to three and two months each. See *Rindgo* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (No. 18,498, decided September 24, 1964). The delay was not harmful to appellant's general denial defense, which was predicated upon disclaiming any contact with either Harris or Moore until at least thirteen and four months, respectively, after the alleged transaction involving the three of them was stated to have occurred (Narc. Tr. 168-170), upon disowning any involvement in narcotics' sales during the month in question (Narc. Tr. 170-172), and upon translating Detective Fogle's all-clear of narcotics charges on February 5, 1963 into an unequivocal vouching for appellant's nonparticipation in any unlitigated narcotics activities prior to that date (Narc. Tr. 144-149). The first two assertions were by their nature ones that only could be made by appellant. They were inherently unsupportable by other witnesses. The last contention was corroborated in full by one of the two conceivably pro-defense witnesses to the

conversation, Charles Scott, a co-defendant on the robbery charge which brought appellant into contact with Detective Fogle on February 5, 1963.[4] There is, thus, no showing of any prejudice to the full presentation of the defense. Compare *Marshall* v. *United States*, —— U.S. App. D.C. ——, 337 F.2d 119 (1964) (defendant so mentally impaired as to be unable to take stand to bolster his own defense as he had done at prior trial of same offense). Under these circumstances of defense-requested delay subtracting nothing from the defense itself at trial, the passage of thirteen months from indictment to trial does not constitute "arbitrary, purposeful, oppressive, or vexatious" delay amounting to a denial of the Sixth Amendment right to a speedy trial. *Smith*, *supra*, —— U.S. App. D.C. ——, ——, 331 F.2d 784, 789.

Appellant entices this Court with a fanciful might-have-been when he avers that any counsel at his arraignment would "no doubt" have sought an immediate order for commitment to St. Elizabeths for mental examination (Assault Brief 31). Doubt on this point would be quite reasonable. Such a motion under 24 D.C.C. § 301(a) requires the submission of a substantial amount of proof, *i.e.*, prima facie evidence of unsound mind or mental incompetency, if it is to be granted.[5] Compare *Wear* v. *United States*, 94 U.S. App. D.C. 325, 218 F.2d 24 (1954), construing 18 U.S.C. § 4244, applicable until superseded in 1955 by § 301(a). In light of the fact that appellant himself refused to give his appointed attorney in the narcotics case any help at all in unearthing evidence and expressed his unwillingness to submit to a mental exam-

---

[4] There is nothing in the record to indicate that the third robbery defendant, Harvey Green, was unavailable for the defense at trial because of the lapse of time.

[5] Or the court may order an examination based on its own observations as it did with respect to appellant on January 28, 1964. Apparently, his antics at his arraignment, while causing the presiding judge some concern for the unfortunate lawyer who would be appointed to represent him (Supp. Rec. on Appeal 3), did not satisfy the judge that appellant was either unsound or incompetent.

ination (Affidavit filed by John F. Burke, Esq., on June 26, 1963 in Connection with Motion for Mental Examination), leaving counsel to his own limited resources, it is understandable that nearly two months went by before the written motion was filed with supporting history. Appellant once again is complaining about delay for which he alone is at fault.

The impact of this delay on the effective presentation of his insanity defense was insignificant. The 1953 diagnosis of appellant did not become transformed. Marion Whitney did not alter here opinion of appellant as a schizophrenic over the intervening months. Although "presumably the less time that elapses between the act and the psychiatric examination, the more accurate will be the medical opinion," *Blunt* v. *United States*, 100 U.S. App. D.C. 266, 275 n. 23, 244 F.2d 355, 364 n. 23 (1957), the medical opinions with respect to the mental conditions alternatively relied upon by appellant in raising the insanity defense, irresistible impulse and sociopathic personality either based upon or reflected by drug addiction, were affected not by the relative non-contemporaneity of the doctors' examination of appellant vis-a-vis the dates of the alleged crimes, but by the doctors' long-range professional views of the nature of the particular conditions. Both Dr. Platkin and Dr. Agler were of the opinion that drug addiction per se did not constitute a mental illness (Assault Tr. 123-124, 140, 148-149). Observation of appellant closer by two months or less to the sale and assault would not have changed their point of view on that matter. Nor would it have convinced them that an irresistible impulse, rather than being a mental disease, was anything more than a normal, human urge to do something that is neither wise nor reasonable, an urge exhibited by every person at sometime in his life (Assault Tr. 108-111) or a natural effort to stop another from interfering in one's way of life (Assault Tr. 153-154). The focus of their medical theories on the nature of these mental conditions upon the "given" of appellant's history of addiction and social truancy was primarily responsible

for their conclusions at the trial. It would be chimerical to suggest that there was the barest possibility that the medical evidence would have favored appellant had it been gathered at a slightly earlier date. Speeding up the film would not have changed the ending.[6]

Appellant's other two claims of prejudice have been dissected, *supra*, in connection with the issue of preliminary hearing at counsel. The record of both trials invalidates his claim that his position at trial would have been bettered had he had access to counsel to interrogate hostile witnesses and forewarning that he was to be charged with assault. The preliminary hearing supplied him with a complete forecast of what Moore's testimony would be at trial so that he was ready and able to counter it. Harris' statements at trial were substantially identical to Moore's with the exception of the divergence of testimony concerning the marking of the bag, a divergence which appellant exploited to the utmost. While appellant may not have been absolutely certain until April 22, 1963, that he was to be charged with hitting Moore, that three week period in which he was left to conjecture about the consequences of his actions at the hearing did nothing to dim his memory of the events[7] (Assault Tr. 77-80) and had no effect on his defense, which was directed to insanity, not to the substance of what occurred (Assault Tr. 15-17, 67, Opening Statement for Appellant 5-6, Closing Argument for Appellant 11, 13).

---

[6] Appellant's attack upon their credibility was directed not to when or how soon the doctors saw him, but to how often and for how long they observed him in comparison to his long-term companion Marion Whitney (Narc. Tr. Closing Argument for Appellant 16-17, 19-21). The quantity, not the velocity of examination was the factor relevant to the quality of their opinions.

[7] Appellant's only apparent memory lapse was his failure to recall whether or not he kicked Moore (he knew he had hit Moore) and why he did what he did, which was part and parcel of his insanity claim (Assault Tr. 80).

III. Appellant was not denied a fair trial on the narcotics charge because of his counsel's failure to raise and the trial court's failure to consider the defense of insanity.

(Narc. Tr. 3-13, 30-37, 51-59, 69, 101-103, 111)

Appellant contends, in effect,[8] that he was denied the effective assistance of counsel in violation of his rights under the Sixth Amendment because his attorney in the narcotics trial should have, but did not raise the defense of insanity and that he was denied a fair trial, irrespective of his counsel's nonfeasance, because the trial court failed to consider the insanity defense sua sponte.

That the failure of counsel to raise an insanity defense might under certain extreme circumstances amount to ineffective assistance rather than a bad judgment as to trial strategy and tactics not constituting a justiciable issue is as yet undetermined in this jurisdiction.[9] Compare *Plummer* v. *United States*, 104 U.S. App. D.C. 211, 260 F.2d 729 (1959) (court, while affirming denial of 28 U.S.C. § 2255 relief for failure adequately to bring the issue to the attention of the district court, suggests that a § 2255 ineffective assistance claim might arise where counsel neglected to raise the insanity defense in connection with a trial for rape of a compulsive sex offender who had been found to be psychotic three months after the offense and adjudicated incompetent thereafter,

---

[8] Appellant nowhere specifically alleges that his counsel was incompetent, but that is the gist of his claim that counsel should have presented the issue of appellant's possible insanity to the jury, instead of predicating his defense solely upon a general denial (Narc. Tr. 111).

[9] To the extent that ineffective assistance means "representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and to correct it," *Diggs* v. *Welch*, 80 U.S. App. D.C. 5, 8, 148 F.2d 667, 670, *cert. denied*, 325 U.S. 889 (1945), a claim of ineffective assistance based upon failure to present an insanity defense would require the court and prosecution to do what *Lynch* v. *Overholser*, 369 U.S. 705 (1962) forbade them to do—impose the defense on an accused.

only to be subsequently found competent, tried, and convicted) with *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 60-62, 259 F.2d 787, 790-792, *cert. denied*, 358 U.S. 850 (1958). But to argue that the circumstances of counsel's actions in this case made the trial proceedings "a farce and a mockery of justice", *Diggs* v. *Welch*, 80 U.S. App. D.C. 5, 7, 148 F.2d 667, 669, *cert. denied*, 325 U.S. 889 (1945), is whimsical.

Appellant's attorney was confronted with a client who was unwilling to undergo any mental examination,[10] unwilling to co-operate in the slightest in preparing such an issue (Affidavit of John F. Burke, Esq., on June 26, 1963 in Connection with Motion for Mental Examination). Counsel nonetheless persisted and was successful in obtaining an examination for appellant. The results could scarcely be said encouraging to such a defense, for the psychiatrists whose opinion was contained in the hospital report of October 8, 1963 (letter dated September 27, 1963) were unable to conclude that the alleged crime was the product of any mental illness of appellant's or, indeed, that appellant had any such illness. Nor was the outcome of the assault case in which insanity had been the sole defense particularly propitious. If that were not enough to scare any reasonable lawyer away from reliance on insanity, the second hospital report of March 26, 1964 surely clinched the matter. Counsel, who only had access to one lay witness who was convinced of appellant's insanity, a witness already presumably discredited by one jury and who was confronted with the unanimous view of several medical experts and twelve jurors, made a wise, not capricious or incompetent decision, in not jeopardizing appellant's promising general denial defense by alternatively relying on insanity.

To argue that, even if the defense did not introduce insanity as a defense, the court had an obligation to take the initiative and raise it for the accused, is to fly directly

---

[10] Appellant was apparently competent to make that decision.

in the face of *Lynch* v. *Overholser*, 369 U.S. 705 (1962) which held that the trial court could not overrule a defendant's disinclination to present the insanity defense and thrust that offense upon him given the automatic commitment statute in the District. If the court could raise the issue, it might deprive a defendant of due process by seriously prejudicing any defense he might have on the merits and subjecting him to the possibility of compulsory commitment to a mental institution based solely upon reasonable doubt as to his sanity rather than preponderant proof of his insanity and danger to the public.[11]

---

[11] Appellant raises an issue as to the sufficiency of the evidence in the narcotics case which may be handled summarily. An appellate should not weigh the evidence or determine the credibility of witnesses, *Glasser* v. *United States*, 315 U.S. 60 (1942); *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956). That is precisely what appellant asks of this Court when he suggests that it decide whether, in light of the admitted confusion as to the marking of the glassine bag by Harris (Moore first said Harris had initialed it [Narc. Tr. 35, 37], then noted that the absence of Harris' initials from the bag meant that apparently he and Harris had not followed the normal marking procedure in this particular instance [Narc. Tr. 51-56]) and despite Moore's certainty that the glassine bag produced in court was the same bag he received from Harris after Harris had obtained it from appellant (Narc. Tr. 57-59, 60), the bag was, in fact, shown to be the same beyond a reasonable doubt. Appellant unsuccessfully made the identical contention in opposing the bag's admissibility, and the trial court quite properly determined that the matter was one of credibility for the jury (Narc. Tr. 101-103). Both Harris and Moore testified to the sale of narcotics appellant to Harris without any inconsistency (Narc. Tr. 3-13, 30-36). If this Court takes the view of the evidence most favorable to the Government, as it must, *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 331, 147 F.2d 28, 30, *cert. denied*, 324 U.S. 875 (1945), it will necessarily find substantial evidence to sustain the jury verdict on the narcotics charge. *Wilson* v. *United States*, —— U.S. App. D.C. ——, 335 F.2d 982 (1963); *Morgan* v. *United States*, —— U.S. App. D.C. —— 319 F.2d 711 (1963).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgments of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT X. PERRY,
HAROLD H. TITUS, JR.,
JOHN R. KRAMER,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 763203 367

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,366 and 18,716

OSCAR DANCY, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

PETITION FOR REHEARING EN BANC

I. Preliminary Statement

The defendant's conviction of three narcotics violations arising out of a sale of heroin by him on December 7, 1962, was reversed and the case remanded for a new trial. The opinion rendered by the panel works a fundamental change in the remedy available to the accused after indictment, trial and conviction when he was not advised at the preliminary hearing of his right to assigned counsel. Furthermore, it expands the scope of discovery at such a hearing beyond anything heretofore suggested by this Court.

The defendant's conviction of assault on a police officer was reversed with directions for the District Court to dismiss the indictment. This assault occurred on April 1, 1963, during a preliminary hearing on the December sale of narcotics. Dismissal of the assault indictment is based on three unprecedented views: (1) the

right to counsel may arise before a crime is committed; (2) the accused is entitled to a preliminary hearing on a Grand Jury original; and (3) the remedy for failure to accord these newly created rights to an accused is dismissal of the indictment.

Because of the importance of these issues to the administration of criminal law in the federal courts, as well as the practical need for a clarification of them in the District of Columbia, the appellee respectfully requests this Court to rehear the case *en banc*.

II. Facts[1]

An arrest warrant charging Oscar Dancy with violation of the federal narcotics laws was issued on March 15, 1963. It was executed at the District of Columbia Jail on April 1, and the defendant was taken for presentment before the United States Commissioner. There, he was advised of his rights in accordance with Rule 5(b), F.R. Crim. P. The Commissioner did not, however, appoint counsel for Dancy or inform him of his right to have the assistance of appointed counsel.

The defendant elected to proceed with the preliminary hearing and, as he later recalled at trial, the undercover officer testified that he had observed the defendant sell a bag of heroin for $12.00 on December 7, 1962.[2] Dancy became irate. He pounded his fist on the table in front of him. Then he stalked out of the hearing room. Later he returned, apologized to the Commissioner, and began to cross-examine the officer. When the witness repeated his previous testimony, however, the defendant attacked him, beating and kicking the officer before he could be restrained.

---

[1] The following statement of facts is included for the Court's convenience.

[2] Detail of the undercover agent's testimony at the preliminary hearing, as the defendant remembered it, may be found in the Assault Transcript, pp. 77-78.

Separate indictments covering the assault and the narcotics sale were filed with the Court on April 22, 1963. At his arraignment four days later, the defendant announced that he did not wish to have an attorney represent him. The Court, nevertheless, ordered the entry of a plea of not guilty and subsequently appointed counsel in each case.

Proceedings in the Assault Case

Counsel was appointed on May 6, 1963—ten days after arraignment. This appointment was vacated on June 7 and new counsel was then assigned to the case. The defendant's motion for a continuance was granted and, on July 2, the Court ordered a mental examination pursuant to defense request. By letter dated September 27, 1963, the Superintendent of Saint Elizabeths Hospital reported that the defendant was competent to stand trial and that he was not suffering from a mental disease or defect on the dates of the alleged crimes. Trial by jury began on October 23 and the defendant raised the defense of insanity. His claim was rejected by the jurors, who returned a unanimous verdict of guilty on October 25. Dancy was sentenced to imprisonment for a term of forty-five days to six months. He noted a timely appeal but had served his sentence on this charge when the case came on for hearing before this Court.

A preliminary hearing was not held on the assault charge. At no time prior to his conviction, however, did the defendant contend that he was entitled to such a hearing on a Grand Jury original. Neither did he allege that his trial defense was prejudiced as a result of his not having been given a preliminary hearing.

Proceedings in the Narcotics Case

Counsel was appointed on May 3, 1963—seven days after arraignment. The motion for a mental examination was made by counsel in this case and granted on July 2 by an order of the court directing that the ex-

amination cover both the assault and the narcotics charges. New counsel was appointed on November 20 at the defendant's request. A second mental observation was ordered in January of 1964, and the Superintendent of Saint Elizabeths once again reported that the defendant was not suffering from mental disorder. Dancy moved to dismiss his second counsel on May 1 but the motion was denied. The insanity defense was not raised at the narcotics trial, and the jury returned a verdict of guilty on May 18, 1964. Dancy noted a timely appeal after receiving concurrent sentences of ten years on two of the counts and five years on the third.

A preliminary hearing was held on the narcotics charge.[3] The defendant was not, however, advised of his right to have appointed counsel represent him and neither was an assignment of counsel made at that time. Before his conviction the defendant did not claim that he was prejudiced by the pre-trial proceedings. He did not seek to gain his freedom by a writ of habeas corpus, and he did not seek a writ of mandamus in an effort to obtain another preliminary hearing.[4]

III. Argument

a. *Reversal of the Narcotics Conviction*

After indictment, trial and conviction the defendant claimed for the first time that he was prejudiced by the inadequacy of the pre-trial proceedings. Specifically, he contended on appeal that the Commissioner's failure to appoint counsel for him at the preliminary hearing, or

---

[3] This hearing was conducted on April 1, 1963—two weeks after the waiver of a preliminary hearing in *Blue* v. *United States*, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964), *cert. denied*, 380 U.S. 944 (1965).

[4] Pre-trial relief by way of habeas corpus or mandamus was suggested in *Blue* v. *United States*, *supra*, after the Court concluded that an uncounselled waiver of preliminary hearing did not justify dismissal of the indictment or a new trial.

to advise him of his right to have appointed counsel, unfairly hindered his defense at the trial.

In *Shelton* v. *United States*,[5] this Court held that the failure to appoint counsel at a preliminary hearing did not invalidate a subsequent conviction when no evidence was obtained at the hearing and used against the defendant at trial.[6] Furthermore, the Court held in *Blue* v. *United States*,[7] that the uncounselled waiver of a preliminary hearing did not justify reversal of a later conviction. The remedy for these pre-trial defects was carefully considered in *Blue* where the Court concluded that a pre-trial writ of habeas corpus to free the accused or a writ of mandamus commanding a proper preliminary hearing was sufficient to protect the legitimate interests of both parties.[8] Nevertheless, in both *Shelton* and *Blue* the Court searched the trial record to determine whether the defendant was "unfairly exposed to, or surprised by, the introduction of evidence that he could have successfully rebutted had he had a pre-trial hearing."[9] Finding no basis for such a conclusion in either case, the convictions were affirmed.

Apart from its general characterization of defense counsel's cross-examination as "tentative and probing,"

---

[5] —— U.S. App. D.C. ——, 343 F.2d 347 (Per curiam), *cert. denied*, 86 S. Ct. 108 (1965).

[6] The introduction of inculpatory statements made by an uncounselled defendant at his preliminary hearing has also been sustained against claims that the defendant's Fifth or Sixth Amendment rights were violated. See *Saunders* v. *United States*, 114 U.S. App. D.C. 345, 347, 316 F.2d 346, 348 (1963); *Nance* v. *United States*, 112 U.S. App. D.C. 38, 39, 299 F.2d 122, 123 (1962).

[7] 119 U.S. App. D.C. 315, 342 F.2d 894 (1964), *cert. denied*, 380 U.S. 944 (1965).

[8] See *Washington* v. *Clemmer*, 119 U.S. App. D.C. 216 & 226, 339 F.2d 715 & 725 (1964).

[9] *Blue* v. *United States*, *supra* at 322, 342 F.2d at 901. Reversal of the conviction was thought unnecessary unless prejudice could be found on the trial record and generally unwise since it would "provide no incentive to defendants to seek pre-trial resolution and cure of defects in pre-trial proceedings."

the panel points to only one incident during the trial that was, in its view, affected by the absence of counsel at Dancy's preliminary hearing. The defense effort to capitalize on contradictory testimony by Government witnesses "was hampered by the difficulty . . . experienced in making the discovery during the trial itself." [10] The discovery referred to was the absence of the informer's initials on the bag of heroin purchased from Dancy. On direct examination both the officer and the informant had testified that the latter had initialed the bag after its purchase and before it was placed in a small manila envelope for transfer to the chemist. However, on cross-examination the officer was asked to inspect the bag, and after doing so, he stated that the informer had evidently failed to mark it. The panel then concluded: "His absence at the preliminary hearing deprived counsel of the opportunity to make a clear presentation of the matter to the jury." [11]

If the defendant had wanted to inspect the markings on the bag of heroin, he may well have been entitled to do so before the trial. Rule 16, F. R. Crim. P., provides in pertinent part:

> Upon motion of a defendant *at any time after the filing of the indictment* or information, *the court may order* the attorney for the government to permit the defendant to inspect and copy or photograph . . . tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable . . . . (Emphasis added.)

Since the undercover officer and his informant claimed that they obtained the bag from Dancy, a motion to inspect could have been addressed to the Court's discre-

---

[10] Slip opinion, p. 4.

[11] *Ibid.*

tion at any time after filing of the indictment.[12] The defendant's opportunity to inspect the bag was not, therefore, curtailed in any respect by the absence of counsel at the preliminary hearing on April 1, 1963. His motion to inspect would not have been proper until the indictment was returned on April 22, 1963. From that date until the trial in May of 1964, however, no motion was made. The fact that defense counsel did not discover the variance from routine police practice in marking evidence before the trial is attributable to his failure to employ Rule 16—not to his absence from the preliminary hearing.

The panel's finding of prejudice at the trial clearly rests on the premise that discovery could have been made at the hearing. But the traditional purpose of a preliminary hearing is only to determine whether there is probable cause to believe that an offense has been committed and that the defendant has committed it. *Barrett* v. *United States*, 270 F.2d 772, 775-76 (8th Cir. 1959); *Barber* v. *United States*, 142 F.2d 805, 807 (4th Cir. 1944); see *Jaben* v. *United States*, 381 U.S. 214, 220 (1965). Although the defendant has the right to cross-examine witnesses against him on the subject matter of their direct examination and to introduce evidence in his own behalf,[13] the preliminary hearing has never been considered as an alternative to the discovery procedures contained in the Federal Rules. If the Government is required to produce the narcotics at a pre-

---

[12] A motion to inspect narcotics under Rule 16 was granted in *United States* v. *Lopez*, 26 F.R.D. 174, 175 (S.D.N.Y. 1960). The Court held that the defendant was not required to admit possession of the contraband in order to inspect it under Rule 16. In *United States* v. *Tirado*, 25 F.R.D. 270, 271-72 (S.D.N.Y. 1958), the Court held that the transfer of narcotics from an informer to the police was a "seizure" and therefore the defendant was entitled to inspect and analyze it under proper safeguards. *Accord*, *United States* v. *Taylor*, 25 F.R.D. 225, 227-28 (E.D.N.Y. 1960) (analyze and inspect). We have found no reported cases denying such a motion for the inspection of narcotics.

[13] Rule 5(c), F.R. Crim. P.

liminary hearing, a new dimension has been added to the preliminary hearing. In the *Blue* decision this Court articulated what has perhaps been a second function of the hearing: a chance for the accused "to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case." [14] This language, the appellee submits, was intended only to express the incidental right of every defendant to hear the evidence constituting probable cause for his arrest and detention before the Grand Jury has returned an indictment against him. Certainly it was not intended as a judicial amendment of Rule 16. Yet the panel's opinion in the instant case accomplishes just that result. Such an enlargement of the discovery rights at a preliminary hearing deserves the attention of the full Court.

In addition to the one incident at trial previously discussed, the panel finds that Dancy was prejudiced in four other respects: if counsel had been assigned (1) the hearing *might* have been postponed to enable the defendant to prepare, (2) cross examination *might* have been helpful on the issue of probable cause and, later, on the issue of guilty or innocence, (3) the defendant's version of the facts *might* have been further developed, and (4) the defendant *might* have been at liberty on bond.[15] It is apparent that Dancy, who had a preliminary hearing and who remembered the testimony of the undercover officer, was no more prejudiced than Blue, who was without counsel and who decided to waive the hearing altogether. Each of the four areas of possible prejudice listed by the panel here was applicable to Blue. Yet Blue's conviction was affirmed when no prejudice resulting from the Commissioner's error could be found in the trial record.

The conclusion that a new and different remedy has been created here seems inescapable. In his brief the appellant urged this Court to adhere to *Blue* only in-

---

[14] *Blue* v. *United States*, *supra* at 322, 342 F.2d at 901.

[15] Slip opinion, pp. 2-3.

sofar as that decision required the Commissioner to inform each defendant of his right to have counsel appointed. He then stated: "But with the Court's conclusion [in *Blue*] as to the available remedial action, the appellant is in complete disagreement." [16] The panel's holding finds prejudice justifying reversal in the speculation that the absence of counsel at the hearing might have affected an otherwise error-free trial. The same could have been said of *Blue*. While the opinion purportedly rests on its own facts, the appellee submits that it works, in effect, a fundamental change in the remedy available to each defendant who has not complained of the inadequacy of his preliminary hearing before reaching this Court.

b. ***Dismissal of the Assault Indictment***

Counsel for appellant in this case stated variously that the assault might not have occurred if Dancy had been represented by counsel,[17] that the assault probably would not have occurred if Dancy had been represented by counsel,[18] and that the assault was the direct result of the fact that Dancy was not represented by counsel at the preliminary hearing.[19] The panel adopted the second of these possibilities, stating that it was "probable that had his right to assigned counsel been observed the conduct which led to the charge of assault would not have occurred." [20]

In *Powell* v. *Alabama* the Supreme Court stated that the accused was entitled to counsel under the due proc-

---

[16] Appellant's Brief, No. 18,716, p. 17.

[17] Appellant's Brief, No. 18,366, p. 25.

[18] *Id.* at p. 10.

[19] *Id.* at p. 15.

[20] Slip opinion, p. 6. In *Blue* this Court held only that the failure to advise a defendant of his right to have counsel appointed was error. The instant opinion follows dicta in *Blue* but goes one step further and holds that the defendant has a statutory right to counsel at the preliminary hearing.

ess clause of the Fourteenth Amendment during the "proceedings against him."[21] And in *Escobedo* v. *Illinois* the majority decided that under some circumstances the defendant has a right to representation by counsel at the moment "the process shifts from investigatory to accusatory."[22] But in no case has this Court or the Supreme Court suggested that the right to counsel extends to a pre-offense stage or that a crime may somehow be the product of the absence of representation by an attorney. The Sixth Amendment guarantee of counsel was intended to minimize the danger of conviction by post-offense procedures beneath which our society finds it repugnant to impose its criminal sanctions. It therefore is not enough to say that the appellant was entitled to counsel at the time he committed the assault. One must continue and ask the purpose for which he was then entitled to representation by an attorney. Clearly, it was to assist in the preparation of his defense against the narcotics charge. Equally clear is the fact that it was not to prevent another crime. In its opinion the panel states that it does not rely "on this ground alone."[23] But to the extent that the decision does rest on the premise that Dancy was not responsible for his actions because he did not have counsel at the time of the crime's commission, the appellee respectfully submits that it is unsupported in precedent and wrong in principle.[24]

---

[21] 287 U.S. 45, 69 (1932).

[22] 378 U.S. 478, 492 (1964).

[23] Slip opinion, p. 6.

[24] Assaults on the marshals and other court personnel at the Commissioner's and at the Court of General Sessions are not infrequent. The appellee, therefore, is particularly concerned insofar as the panel's opinion implies that an unrepresented accused has a license to commit an offense without subjecting himself to the penalties of the criminal law. It finds equally disturbing the thought that a represented accused who is not restrained or dissuaded by his attorney might claim ineffective assistance of counsel.

Two further reasons are given by the panel in support of its decision to require a dismissal of the assault indictment. The appellant was neither given a preliminary hearing on the assault indictment nor was he represented by counsel at his arraignment on that charge. In the recent case of *Crump* v. *Anderson*,[25] however, this Court held that an accused was not entitled to a preliminary hearing after the return of an indictment by the Grand Jury. See *Jaben* v. *United States*, *supra* at 220 (1965). *A fortiori*, he is not entitled to a hearing when he has never been arrested and detained on the charge prior to the return of the Grand Jury's original indictment. *Godfrey* v. *United States*, No. 19,260, decided November 5, 1965. This result was clearly intended by the formulators of the Federal Rules of Criminal Procedure: Rule 9(c)(1) provides that the officer executing a warrant based on an indictment shall take the arrested person promptly before the court; but Rule 5 provides that the officer making an arrest without a warrant or under a warrant based only on a complaint shall take the arrested person promptly before the nearest Commissioner for a preliminary hearing. The appellee therefore believes that the panel's opinion in this respect conflicts with other recent decisions of this Court.

The same may be said of the panel's holding that Dancy was entitled to counsel at his arraignment where he entered a plea of not guilty. In *McGill & Hinton* v. *United States*,[26] this Court stated that the defendant was not exposed to even a reasonable possibility of prejudice at arraignment when he entered a plea of not guilty without counsel. Therefore, the absence of counsel at that time did not present a basis for reversal of the conviction.[27] In the instant case, however, the panel cites this circumstance in support of its decision to dismiss the indictment.

---

[25] No. 19,071, decided June 15, 1965.

[26] —— U.S. App. D.C. ——, 348 F.2d 791 (1965).

[27] *Id.* at ——, 348 F.2d at 794.

The remedy decided upon by the panel is unprecedented. Ordinarily a denial of the constitutional right to counsel will warrant only the reversal of a conviction and the suppression of any illegally obtained evidence. However, where no evidence was obtained, and where the right to counsel was found in a statute rather than in the Constitution, the panel here ordered a dismissal of the indictment. If intended as a bar to future prosecution, the dismissal creates a license for the otherwise criminal conduct of the accused. Since the Court chose to have the indictment dismissed, it seems reasonable to conclude that this unusual remedy was designed to implement the heretofore unprecedented right to counsel at a pre-offense stage. The appellee believes that both the right and the remedy should take effect only after consideration by the Court *en banc*.

When its judgment will have no effect on the parties before it, this Court will dismiss a case for mootness. The appellee, therefore, moved to dismiss No. 18366 because the appellant had already served his sentence. Recognizing that the collateral consequences incident to a felony conviction may sometimes have sufficient impact on the defendant to warrant a decision, the panel found that it could appropriately render a judgment here.[28] In its view an erroneous conviction of assault would deprive Dancy of his right to vote under 1 D.C. Code § 1102(2)(c) because no one with a felony conviction may qualify as an elector in the District of Columbia. Furthermore, the panel noted that 22 D.C. Code § 104 provides that the sentence for a second conviction of any criminal offense may be increased by one-half the maximum allowable for a first offender.

The appellee, however, believes that the appellant has an insufficient interest to require a decision in this case. He had been convicted of thirteen felonies prior to the time when he was charged with the narcotics and as-

---

[28] Slip opinion, pp. 7-8.

sault violations now on appeal.[29] Consequently, his right to vote will not be affected by the assault conviction. Of course, a second conviction for assaulting a police officer could result in a greater sentence. But before the Court's judgment could affect the parties here, the appellant would have to commit the offense again, he would have to be apprehended and brought to trial, and the Court would have to see fit to impose the stiffer penalty. This seems, at best, a remote possibility, and one that should require a decision by this Court only after it occurs. Any other result would appear to render the mootness doctrine inapplicable to criminal appeals in the District of Columbia where anyone convicted of an offense is subject to the discretionary, rather than mandatory, imposition of a greater penalty for his second conviction.

---

[29] At the assault trial the appellant admitted that he had been convicted of two felonies in 1945 and two others in 1953 (Assault Transcript, pp. 98-99). At the narcotics trial he admitted that he had been convicted of ten felonies in 1953 (Narcotics Transcript, p. 174). The record of known felony convictions may be found in the District Court under the following case numbers:

Criminal No. 74,894 (robbery, 1945),
Criminal No. 74,896 (unauthorized use of a motor vehicle, 1945),
Criminal No. 76-48 (unauthorized use of a motor vehicle, 1948).
Criminal No. 138-53 (robbery, 1953),
Criminal No. 288-53 (nine narcotics convictions, 1953).

CONCLUSION

Wherefore, the appellee respectfully requests this Court to rehear these cases *en banc*.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
CHARLES L. OWEN,
Assistant United States Attorneys.

CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

CHARLES L. OWEN,
Assistant United States Attorney

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 788180 270

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OSCAR DANCY, JR.,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

Nos. 18,716 and 18,366

ANSWER TO PETITION FOR REHEARING EN BANC IN NO. 18,366

In the case at bar appellant was convicted of assaulting a police officer (in violation of 22 D. C. Code §505(a)) in the course of appellant's "unskilled attempt to cross-examine"[1/] the officer (the complaining witness) during appellant's preliminary hearing on a complaint charging him with violations of the narcotics laws.

On appeal, a panel of this Court reversed the assault conviction and remanded the case with directions to dismiss the indictment.

This case is related to a companion case, No. 18,716, heard by the same panel, in which appellant's conviction of

---

1/ Oscar Dancy, Jr. v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (Nos. 18,366 and 18,716, October 14, 1965, slip opinion at p. 6, n. 4.

three narcotics violations (21 U.S.C. §174, 26 U.S.C. §§4704(a), 4750(a)) was reversed and a new trial granted.[2/]

In the narcotics case, the Court found from the record that appellant was prejudiced by not having been afforded assigned counsel at his preliminary hearing. In the assault case, the Court held that it was probable, had appellant's statutory right to assigned counsel been observed at his preliminary hearing on the narcotics charge, that the conduct which led to the charge of assault would not have occurred.

The appellee has petitioned this Court for a rehearing en banc in both cases. With respect to the assault case, appellee states that the dismissal of the indictment "is based on three unprecedented views:

> (1) the right to counsel may arise before a crime is committed; (2) the accused is entitled to a preliminary hearing on a Grand Jury Original; and (3) the remedy for failure to accord these newly created rights to an accused is dismissal of the indictment."[3/]

2/ Counsel for appellant in the case at bar, No. 18,366, the assault case, does not represent appellant in No. 18,716, the narcotics case.

3/ Appellee's Petition for Rehearing En Banc, Nos. 18,366 and 18,716, at pp. 1-2.

I.

Appellee is in error, it is submitted, in attempting to read into the Court's opinion in the assault case any of the broad "views" stated. Instead, what was said by the Court must be interpreted in light of the unique facts involved in that case.

Appellee seems to argue that this case extends the right to counsel "to a pre-offense stage" and "that a crime may somehow be the product of the absence of representation by an attorney."[4/] Such an argument is not supported by the Court's opinion. The preliminary hearing in the narcotics case was a step in the administration of criminal justice in the District of Columbia. Such administration of criminal justice is subject to the supervisory powers of this Court. Appellant's act in striking the police officer whom he was cross-examining is not in any way analogous to the species of criminal assaults associated with robbery or an attempted escape from lawful custody. On the contrary, the Commissioner's act of inviting the emotionally unstable appellant to cross-examine the officer - after appellant's earlier outburst in which he pounded his fist on the counsel table and stalked from the

---

4/ Appellee's Petition, p. 10.

hearing room - was more analogous to a common law entrapment. The facts of record make it clear the Commissioner knew at the time that appellant was emotionally unstable.

In the Federal courts a judicial proceeding in the nature of a preliminary hearing is for the purpose of affording a defendant the instrumentalities of due process in order to rebut, if possible, a showing of probable cause and to aid him in ascertaining the foundations of the charge and the nature of the evidence that will be used against him. An indigent accused person needs the assistance of counsel properly and effectively to employ these instrumentalities in the accused's behalf. Furthermore, in the District of Columbia, it is the mandate of Congress that an indigent defendant in a felony case be assigned counsel at his preliminary hearing, unless such a right is properly and knowingly waived. The Commissioner's failure to inform appellant of his right to appointed counsel and, in view of all the facts of record, allowing appellant to cross-examine the police officer after an initial emotional outburst were acts subject to this Court's supervisory powers. These acts so tained the preliminary hearing in the narcotics case "with unconstitutionality and irrevocable prejudice to the accused as to render his indictment on the assault charge a nullity."[5/]

5/ Appellant's Brief, No. 18,366, p. 24.

Clearly, in view of the record, the Court was right in finding that it was "probable that had his right to assigned counsel been observed the conduct which led to the charge of assault would not have occurred." Because of this and the other prejudicial facts discussed by the Court, it reversed the conviction and ordered the indictment dismissed - and rightly so.

II.

The Court did not decide that "the accused is entitled to a preliminary hearing on a Grand Jury Original." What it said was:

> ". . . We need not, however, decide the present appeal on this ground alone [that it was probable had appellant's right to assigned counsel been observed the assault would not have occurred]; for appellant was not given a preliminary hearing at all on the assault charge, with or without counsel; and after his indictment for assault he was arraigned for that offense, without counsel. Counsel who could actually represent him was not appointed until some 43 days after the indictment. During all this time he was in jail on a charge which was later dismissed, as stated in No. 18,716 above."

The most that can fairly and logically be elicited from the foregoing language, and from the facts of record, is that the fact that appellant did not have a preliminary hearing on the assault charge was one of the factors which contributed to the delay in assigning counsel to him, which delay, in turn, was highly prejudicial to him.

The Court did not hold that the appellant was entitled to a preliminary hearing on the assault charge, but merely that a preliminary hearing was "not given"[6/] and that "unlike Blue, appellant was granted no preliminary hearing."[7/] These are simple statements of fact - and are true. Neither did the Court state that a preliminary hearing should have been "given" or "granted."

However, even if it be assumed, arguendo, that this case does support the "view" that an accused may, under some circumstances, be entitled to a preliminary hearing after an intervening indictment, such a "view" is neither "unprecedented" nor in conflict with existing law in the District of Columbia. This Court, in fact, had more to say about the right of an accused to have a preliminary hearing after the return of an indictment in the case of Blue v. United States, 119 U.S. App. D.C. 315, 342 F. 2d 894 (1964), cert. denied, 380 U.S. 944 (1965):

> "7. These remedies [habeas corpus or mandamus prior to trial] should, of course, be asserted at the earliest possible moment. Where, however, indictment occurs before it is feasible for assertion or resolution of the claim to have been made, relief is not

---

6/ Oscar Dancy, Jr., v. United States, supra, slip op. at p. 6.

7/ Id. at p. 8.

to be denied for that reason alone. In a preliminary hearing held or reopened after indictment, the Commissioner would continue under the necessity of making his own independent determination of probable cause. If he were persuaded that no such cause existed, that finding would result in his release of the defendant. It would not affect the indictment, although the Commissioner's action would presumably cause the prosecutor to review the indictment again with care. The defendant could be made to respond to the indictment by summons, or a resumption of custody could be sought by application for a bench warrant. In the latter case, such a singular circumstance as a finding of no probable cause by the Commissioner would presumably be a factor for consideration by the court." 342 F. 2d at p. 900, n. 7.

In the text of the opinion, the Court further stated:

"With such opportunities available for relief before trial despite intervening indictment, there will, of course, be a corresponding obligation to make a timely assertion of the alleged defects or, in default thereof, be thereafter foreclosed from reliance upon them as invalidating the conviction. Every counsel who enters a criminal case will presumably review the preliminary proceedings and determine whether or not a defect of substance has occurred. With counsel appearing either at the preliminary hearing stage itself, or, at the latest, before arraignment upon the indictment, there is normally adequate time before trial to file the necessary petitions if they are called for."8/ (Emphasis added.)

8/ Blue v. United States, supra, at p. 900.

In the foregoing language, the Court was setting forth guidelines for future cases. The Court stated that it would not hold Blue "to as rigorous a standard of timely action as we contemplated for cases arising in the future."[9/] Appellant Dancy's case was tried prior to the Blue decision and Dancy did not have counsel at his arraignment or until 43 days after the indictment was returned. This delay was highly prejudicial.

Crump v. United, States, No. 19,071, decided June 15, 1965, is cited by the appellee as a holding by this Court that an accused is not entitled to a preliminary hearing after the return of an intervening indictment. The Crump case does not stand for such a proposition. This Court did not issue an opinion but simply affirmed the court below.

According to the facts set forth in the Government's brief in the Crump case,[10/] Crump was arrested, booked for first degree murder and taken before the United States Commissioner on the same day. The Commissioner continued the preliminary hearing until counsel was assigned to represent the accused. After counsel was appointed, a Coroner's inquest was held, where the accused was represented by Legal Aid counsel.

9/ Blue v. United States, supra, at p. 901.

10/ Appellant's Brief in No. 19,071, pp. 2-3.

The Coroner rejected the accued counsel's request to subpoena additional witnesses, although the accused's attorney was afforded the opportunity to cross-examine witnesses and to present witnesses to rebut "probable cause."

After the Coroner's inquest, and on the same day, the accused appeared with assigned counsel before the United States Commissioner for preliminary hearing; over the Government's objection, the Commissioner continued the hearing for four days at appellant's request. When the preliminary hearing was reconvened, the Commissioner denied appellant's request that subpoenas be issued for the compulsory attendance of witnesses and refused to conduct the hearing on the grounds that an intervening indictment had been returned against the appellant rendering the hearing moot. Accused's counsel petitioned the district court for a writ of habeas corpus alleging, inter alia, that the accused had been denied his right to a preliminary hearing. The court stated that, if counsel had the names of witnesses to rebut probable cause, the court would issue subpoenas for such witnesses and convene a hearing for their testimony. The accused's counsel, however, was not prepared to submit such names and the court denied the petition for habeas corpus.

The Government's argument-in-chief on appeal was not that appellant Crump had no right to a preliminary hearing

because an indictment had been returned, but, rather, that the Coroner's inquest and the court's offer were an adequate substitute for a preliminary hearing. Clearly, the Crump case does not conflict with the case at bar.

The appellee's counsel cites Jaben v. United States, 381 U.S. 214, 88 S. Ct. 1365 (1965), of their petition.[11] The Jaben case involved a statute of limitations question with respect to the issuance of an income tax evasion complaint.

The Commissioner found probable cause on the complaint but postponed the preliminary hearing at the Government's request. An intervening indictment was filed and the hearing was never held. The only question considered by the court which was relevant to the preliminary hearing was whether the long postponement of the hearing violated accused's right to a hearing "without unnecessary delay." The court did not decide that the intervening indictment had extinguished the accused's right to a preliminary hearing.

III.

The Government takes issue with the relief given to appellant. It is submitted that, under all the circumstances of this case, including the fact that he had served his sentence, the only just relief available was reversal of

---

11/ This case was also cited on p. 7 of appellee's petition with reference to the narcotics case, No. 18,716.

the conviction and dismissal of the indictment.

The appellee again raises the question of mootness. Its argument, however, is without merit and this Court has already rejected it.

In the course of its argument, the Government refers to the felonies of which the appellant has already been convicted, in an attempt to show "that appellant has an insufficient interest to require a decision in this case." But, as the Supreme Court said in Parker v. Ellis, 362 U.S. 574 (1960) at p. 598, n. 5:

> ". . . We have no way of knowing what other measures may be available to relieve petitioner of the sitgma of the other felonies. Only if we were certain (as we are not) that there are or will be none could we fail to give him relief against the wrong done here by the processes of the law."

Conclusion

Appellant, as this Court rightly found, was irrevocably prejudiced by the denial of his rights in the assault case. He had served his sentence before his appeal could be heard. Under the circumstances, the only available relief in all justice was that given by this Court, namely,

reversal of the conviction and dismissal of the indictment. Clearly, the Government's petition for a rehearing en banc should be denied.

Respectfully submitted,

Andrew W. McThenia, Jr.

711 Princess Street
Alexandria, Virginia

Newell A. Clapp

Bernard M. Beerman

1144 The Pennsylvania Building
Washington, D. C.

Counsel for appellant appointed by this Court

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 13716

OSCAR DANCY, JR.

Appellant

v.

UNITED STATES OF AMERICA

Appellee

141

Appeal from a judgment of the
UNITED STATES DISTRICT COURT
For the District of Columbia

CHARLES M. FISTERE

BENJAMIN G. HABBERTON

Court-Appointed Counsel
301 Continental Building
1012 Fourteenth Street, N.W.
Washington 5, D.C.

STATEMENT OF QUESTIONS PRESENTED

I

Whether failure to afford the assistance of assigned counsel to this indigent accused at his preliminary hearing constituted a denial of rights conferred by the District of Columbia Legal Aid Act.

II

Whether failure to afford the assistance of assigned counsel to this indigent accused until 33 days after his arrest denied him his Sixth Amendment right to effective assistance of counsel.

III

Whether the failure to afford the assistance of assigned counsel to this indigent accused at the preliminary hearing and at arraignment denied him his Sixth Amendment right to effective assistance of counsel.

IV.

Whether failure to afford the assistance of assigned counsel to this indigent accused at the preliminary hearing constituted discrimination in violation of the equal protection of the laws guaranteed by the Constitution.

V.

Whether failure to present or consider the defense of possible insanity of the accused deprived him of a fair trial.

VI.

Whether there was sufficient evidence of guilt to submit to the jury.

UNITED STATES COURT OF APPEALS

For The District of Columbia

No. 13716

OSCAR DANCY, JR.

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Appeal from a judgment of the
United States District Court
For the District of Columbia

Brief for Appellant

INDEX

TABLE OF CASES AND AUTHORITIES

JURISDICTIONAL STATEMENT

Appellant appeals from a conviction in the United States District Court for the District of Columbia on all counts of a three-count indictment which charged violation of 26 U.S.C. 4705(a), 4704(a), and 21 U.S.C. 174 (Sale, possession, and facilitation of concealment and sale of a narcotic drug, knowing same to have been imported contrary to law). A jury on May 18, 1964 found the accused guilty as indicted.

On June 5, 1964, appellant appeared before the Honorable William B. Jones and was sentenced to imprisonment for ten years on Count One, five years on Count Two, and ten years on Count Three, all three sentences to run concurrently.

On June 5, 1964, Judge Jones ordered that appellant be allowed to proceed on appeal without prepayment of costs. (Rec.)

The jurisdiction of this Court on appeal of this cause is founded upon the Act of June 25, 1948, ch. 646, § 1; 62 Stat. 929; Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE

The appellant was served with a warrant of arrest on April 1, 1963 by a United States marshal and was that date brought before Samuel Wertleb, United States Commissioner for the District of Columbia, for preliminary examination. (Rec.)

On the front side of the form employed by the Commissioner to report the proceedings had an appellant's first appearance before him ("Record of Proceedings in Criminal Cases"), the Commissioner makes the following statement:

> "Proceedings taken -- Complaint prepared. Defendant was informed of the complaint and of his right to have a preliminary hearing and to retain counsel. Defendant was not required to make a statement and was advised that any statement made by him may be used against him. Defendant was advised of his right to cross-examine witnesses against him and to introduce evidence in his own behalf. Defendant requested a hearing now -- Probable cause shown -- see reverse side for testimony." (Rec.)

On the reverse side of the form is the Commissioner's report of the preliminary hearing accorded to appellant. The report states that Rufus Moore, a witness for the United States, testified before the Commissioner and that during his testimony, ".....the Def. smacked both of his hands on the counsel table and walked out of the hearing room back to the cell block; several minutes later the Def. returned and apologized." The Commissioner found probable cause to be shown. Appellant was held to answer in United States District Court, and bail was fixed in the amount of $3,500. Appellant did not post bail. Blanks on the report form for entry of appearance of counsel show that appellant did not have counsel at the preliminary hearing. (Rec.)

On April 22, 1963, a grand jury indictment was filed in open court charging appellant, in three counts, with violation of 26 U.S.C. 4705(a), 4704(a), and 21 U.S.C. 174 (Sale, possession, and facilitation of concealment and sale of a narcotic drug, knowing same to have been imported contrary to law). (Rec.)

On April 26, 1963, appellant appeared before Judge McGuire, of the United States District Court, without counsel, for arraignment on both the indictment herein and another separate indictment charging assault on a member of the police force. In answer to inquiries by the Deputy Clerk, appellant stated that he had no lawyer, didn't want one, and didn't intend to get one. With reference to the indictments, he said "I don't enter no pleas on it." The Court at that point directed that a plea of not guilty be entered in each case. (Page 2, Transcript of Arraignment). The Court then asked him if he was going to be his own lawyer. Appellant responded "I don't have no qualifications to be a lawyer. I don't want a lawyer." The Court then directed that counsel be appointed for him (Page 3, Transcript of Arraignment). The "Plea of Defendant" herein recites:

> "On this 26th day of April 1963 the defendant Oscar Dancy Jr., appearing in proper person and requests that counsel be appointed by the Court, which is so oredred, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto. The Defendant is remanded to the District of Columbia Jail." (Rec.)

On May 3, 1963 an order was entered appointing John F. Burke, Esquire, to represent the appellant.

An affidavit filed by Mr. Burke on June 26, 1963 details the history of the appellant since 1943 and supports his motion to commit the

appellant to a mental hospital for examination as to his condition and competency to stand trial. By order made and filed July 2, 1963, appellant was committed to St. Elizabeth's Hospital for examination for not to exceed 90 days. (Rec.)

A letter dated September 27, 1963, filed October 8, 1963, from the Superintendent of St. Elizabeth's advised that appellant had been examined and had been found to be mentally competent for trial and to be subject to no mental disease or defect. (Rec.)

On November 19, 1963, the defendant, by his court-appointed counsel, Mr.Burke, moved for a lie detector test and for appointment of new counsel. Both motions, by direction of Judge McGuire, were denied. (Rec.)

Likewise on November 19, 1963, the appellant himself and his court-appointed counsel appeared before Judge Keech, and the appellant pro se orally moved to have new counsel appointed to defend him, and this motion was granted. Appellant was remanded to the District of Columbia jail. (Rec.)

On November 20, 1963, an order was entered vacating the appointment of Mr. Burke and appointing Benjamin F. Amos, Esquire, to represent the appellant.

A motion for a lie detector rest or for truth serum, made by the appellant by his new court-appointed attorney, Mr. Amos, was denied December 13, 1963 by direction of Judge McGuire.

Another motion by appellant for a lie detector test or for truth serum was denied January 3, 1964 by direction of Judge McLaughlin. (Rec.)

The case came on for trial before Judge McGarraghy on January 28, 1964, but after a few preliminary remarks, and with the mutual consent of counsel, the Court ordered appellant again committed to St. Elizabeth's Hospital for a period not to exceed 90 days, for further determination of his mental competency. (Rec.)

A letter dated March 26, 1964, from the Superintendent of St. Elizabeth's advises that the appellant has again been examined and his case reviewed, and that the appellant is found mentally competent for trial. (Rec.)

On May 8, 1964, a letter from the appellant, considered as being in the nature of a motion by him to dismiss his court-appointed counsel, was considered by the Court and denied.

After having been respited from May 13, 1964 to May 14, 1964 and then to May 18, 1964, trial was concluded on May 18, 1964. The jury found appellant guilty as indicted. The Court (Judge Jones) referred the case to the Probation Officer and remanded appellant to the District of Columbia Jail. (Rec.)

On June 5, 1964, the Court (Judge Jones) sentenced appellant to imprisonment for 10 years on Count one of the indictment, for 5 years on Count two, and for 10 years on Count three, all sentences to run concurrently. (Rec.)

Appellant's application to proceed on appeal without prepayment of costs was granted. (Rec.)

On January 5, 1965 this Court denied appellant's motion that this appeal be consolidated for all purposes with appellant's appeal (No. 18,366)

from conviction under the indictment, referred to above, for assault upon a member of the police force. Although denying this motion, the Court ordered that these two cases be scheduled for oral argument on the same day before the same division of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . "

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rule of Criminal Procedure 5(b), (c):

> "(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.
>
> "(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

Proposed Federal Rule of Criminal Procedure 5(b):

"(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The Commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

Federal Rule of Criminal Procedure 44:

"Assignment of Counsel. If the defendant appears in court without counsel, the court shall advise him of right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

Proposed Federal Rule of Criminal Procedure 44:

"(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment."

The Code of the District of Columbia, Title 2, §2202:

"§2-2202. Counsel for indigents to be provided in criminal proceedings and proceedings of a criminal nature.

"The Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases, and in cases involving offenses against the United States in which imprisonment may be for one year or more in the Municipal Court for the District of Columbia, in proceedings before the Coroner for the District of Columbia and the United States Commissioner, in proceedings before the juvenile court of the District of Columbia, and in proceedings before the Commission on Mental Health of the District of Columbia and proceedings in the courts arising therefrom.

"The Agency shall from time to time advise each of the courts and tribunals named in this section of the names of the attorneys employed by the Agency who are available to accept assignments in said court or tribunal. The judges or other presiding officers of the several courts and tribunals may assign attorneys employed by the Agency to represent indigents, such assignments to be upon a case-to-case basis, a group-of-cases basis, or a time basis, as the assigning authority may prescribe. Each such court and tribunal will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable."

STATEMENT OF POINTS

1. Failure to afford the assistance of assigned counsel to this indigent accued at his preliminary hearing constituted a denial of rights conferred by the District of Columbia Legal Aid Act.

2. Failure to afford the assistance of assigned counsel to this indigent accused for a period of 33 days while he was in jail constituted a denial of the Sixth Amendment guarantee of the effective assistance of counsel.

3. Failure to afford the assistance of assigned counsel to this indigent defendant at his preliminary hearing constituted a denial of the Sixth Amendment requirement that counsel be made available to a criminal defendant at every critical stage of the proceedings against him.

4. Failure to afford the assistance of assigned counsel to this indigent accused at his arraignment constituted a denial of the Sixth Amendment requirement that counsel be made available to a criminal defendant at every critical stage of the proceedings against him.

5. Since the right to retain counsel for the preliminary hearing is absolute, failure to assign counsel to represent this indigent defendant at his preliminary hearing constituted a denial of the equal protection of the laws.

6. Failure to present or consider the issue of the possible insanity of the accused deprived him of a fair trial.

7. There was insufficient evidence of guilt to submit to the jury, and the District Court erred in not granting appellant's motions for acquittal.

SUMMARY OF ARGUMENT

I. It is clear from the District of Columbia Legal Aid Act that Congress intended that defendants in criminal proceedings, if indigent, should have the right to have counsel assigned to represent them at preliminary hearings and that the requirements of this Act are not satisfied by the Commissioner's advising the accused of his right to retain counsel. In the present case, the Commissioner advised the appellant, who was indigent, of the latter right but said nothing at all about the former, and when appellant requested a hearing, the Commissioner proceeded with hearing of an uncounseled accused. That this was inadequate preliminary procedure under the Act appears to be established by Blue v. United States decided by this Court on October 29, 1964. But the relief prescribed by Blue is too limited, and should not in any event preclude the full relief of dismissal of the indictment in the present case since the present case had been tried before Blue was decided. Furthermore, there are constitutional grounds on which this result may rest.

II. The Sixth Amendment guarantees that an accused shall have the assistance of counsel for his defense, and the Supreme Court has said that this means the effective assistance of counsel. The Supreme Court has said also that effective assistance includes assistance in the preparation of the defense and not merely assistance at trial. This early assistance ought to begin promptly after arrest, when the accused may need counsel more than at any other time. In the instant case, the appellant, who was indigent, was not afforded the advice and assistance of counsel until thirty-three days after his arrest, and he was in jail

during this entire period. This falls far short of satisfying the effective assistance of counsel guaranteed by the Sixth Amendment.

III. In construing the Sixth Amendment guarantee of the effective assistance of counsel, the Supreme Court has said that it makes it mandatory that the accused have the assistance of counsel at <u>every critical stage</u> of the proceedings against him. The preliminary hearing is such a critical stage. Under federal procedure it is a hearing at which probable cause may be found for binding the accused over and at the same time is one at which the accused may win his freedom by rebutting probable cause. Much is at stake at this very time. Yet, in the present case, appellant was not advised of his right to have counsel appointed to assist him at his preliminary hearing, and the assistance of counsel was not in fact afforded him. Appellant was materially prejudiced thereby since if he had had the assistance of counsel at the hearing, he might have gained his freedom instead of being deprived of it. Appellant was thus denied the Sixth Amendment right to have the assistance of counsel at every critical stage of the proceedings against him.

IV. Like the preliminary hearing, the arraignment is also a critical stage of the proceedings against an accused, and hence an indigent accused is guaranteed the assistance of counsel at his arraignment. The Sixth Amendment guarantee applies equally. And if it was ever the law, it no longer is, that a distinction is to be drawn between an arraignment where a defendant pleads guilty and one where he pleads not guilty. In the instant case, when the appellant appeared before the trial judge for arraignment, it had been twenty-six days since his arrest and he still was

without counsel, and the court proceeded to arraign him while he was still without counsel. This denied him the Sixth Amendment guarantee of the assistance of counsel at every critical stage of the proceedings against him.

V. The Rules of Criminal Procedure applicable to the right to counsel at preliminary hearings discriminate invidiously against the indigent accused and hence deny the equal protection of the laws. Rule 5(b) requires the Commissioner to advise the accused of his right to retain counsel but does not require him to advise the accused of his right to have counsel assigned to represent him if he is financially unable to employ counsel. Furthermore, the Advisory Note to Rule 44 makes it clear that the requirement of Rule 44 that that the Court shall advise the accused of his right to counsel and shall assign counsel to represent him applies only to proceedings in court and does not apply to preliminary hearings before the Commissioner. The result is that the accused with funds is favored over the accused without funds. The former is advised of his rights, while the latter is not. This transparent discrimination effectually denies the equal protection of the laws.

VI. The accused was two times before trial committed to St. Elizabeth's for mental examination. Although he was each time found to be mentally competent to stand trial, it was found that he was actively addicted to narcotics and that the criminal acts with which he was charged, if committed by him, were causally related to his narcotic addiction. Furthermore, the affidavit filed by John F. Burke, Esquire, the accused's

first court-appointed counsel, contained much information bearing upon the accused's mental history and condition. Yet, there is nothing in the transcript of the trial proceedings to indicate that these matters were considered at trial, or, in fact, even raised. The accused could not have had a fair trial under these circumstances.

VII. The accused two times moved for judgment of acquittal -- at the conclusion of the government's case in chief and again at the conclusion of the entire case. Each time the Court overruled the motion, and each time the Court was in error in doing so. The testimony of the government witnesses was confused, conflicting, and self-contradictory. The testimony on the signing and marking of the glassine bag was especially so, and this testimony goes to the very core of the criminal acts charged. In this state of facts the Court should have granted the first motion for acquittal, and having refused to do so, should have granted the second. It was error not to do so.

ARGUMENT

I. FAILURE TO AFFORD THE ASSISTANCE OF ASSIGNED COUNSEL TO THIS INDIGENT ACCUSED AT HIS PRELIMINARY HEARING CONSTITUTED A DENIAL OF RIGHTS CONFERRED BY THE DISTRICT OF COLUMBIA LEGAL AID ACT.

After assigned counsel for appellant had begun the preparation of this brief, this Court on October 29, 1964 decided the case of Blue v. United States, _____ U.S. App. D.C._____, _____F. 2d_____(No. 18,401).

In this highly significant case, this Court held that the requirements of the District of Columbia Legal Aid Act, 1960, 2 D.C. Code §§ 2201-10, 1/ were not satisfied by the pretrial proceedings accorded a seventeen year old juvenile accused of robbery and of assault with a dangerous weapon.

1/ "s2-2202. Counsel for indigents to be provided in criminal proceedings and proceedings of a criminal nature.

The Agency shall make attorneys available to represent indigents in criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases, and in cases involving offenses against the United States in which imprisonment may be for one year or more in the Municipal Court for the District of Columbia, in proceedings before the Coroner for the District of Columbia and the United States Commissioner, in proceedings before the juvenile court of the District of Columbia, and in proceedings before the Commission on Mental Health of the District of Columbia and proceedings in the courts arising therefrom.

The Agency shall from time to time advise each of the courts and tribunals named in this section of the names of the attorneys employed by the Agency who are available to accept assignments in said court or tribunal. The judges or other presiding officers of the several courts and tribunals may assign attorneys employed by the Agency to represent indigents, such assignments to be upon a case-to-case basis, a group-of-cases basis, or a time basis, as the assigning authority may prescribe. Each such court and tribunal will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable."

When the accused in that case was brought before the Commissioner for examination, he was without counsel, and although the Commission advised him of his right to retain counsel, he failed, as he did in the instant case, to advise him of his right to have counsel assigned to assist him, and he failed, as he did in the instant case, to assign counsel to assist him. Thus uncounseled, the accused waived preliminary hearing and was bound over and subsequently indicted. After the indictment was returned, counsel was appointed by the District Court to represent the accused in the trial which resulted in the convictions from which he then appealed.

This Court points out that the very first section of the District of Columbia Legal Aid Act recites that the Legal Aid Agency thereby created was "to provide legal representation of indigents in judicial proceedings in the District of Columbia, as provided in Section 2-2202." Section 2-2202, says the Court, "is equally clear as to the nature of the judicial proceedings which Congress had in mind." (Slip opinion at 2.)

The Court points out that the Act,

> "sets forth two explicit obligations: One is that of the Agency to make attorneys available in preliminary hearings in felony cases, including those before the Commissioner; and the second is that of each court and tribunal, which in the context clearly includes the Commissioner, 'to provide assignment of counsel as early in the proceedings as practicable.'" (Slip opinion at 5.)

The Court says,

> "It seems to us that the language cannot be read -- at least with anything like a due regard for the fair intendment of Congress -- as limiting the Commissioner's responsibilities in a case like the one before us to a routine notification under Rule 5 that appellant may retain his own counsel." (Slip opinion at 5, 6.)

The Court continues:

> "We do not believe that the 1960 statute reflects any assumption by Congress that its benefits were to be available to a seventeen year old boy with a seventh grade education only if he affirmatively raised the question and requested them . . . . and we regard the uncounseled status of the appellant when he waived preliminary hearing as infecting that waiver." (Slip opinion at 9, 10.)

It is submitted that the situation of the appellant in the instant case is at least as deserving of this treatment as was that of the accused in the Blue case. Here, the appellant did not waive preliminary hearing but insisted upon a hearing and went throught it, without counsel, with a government witness appearing and testifying against him and the Commissioner making a finding of probable cause against him. Clearly in the instant case there was the same denial of rights conferred by the 1960 Act as in the Blue case. There was exactly the same failure on the part of the Commissioner to advise the accused of his right to have counsel assigned to represent him and exactly the same failure to see that such counsel was appointed before the preliminary hearing proceeded.

With the conclusion of this Court in Blue that the pretrial proceedings were inadequate and hence unlawful, the appellant in the instant case is in hearty agreement. But with the Court's conclusion as to the available remedial action, the appellant is in complete disagreement. The Court concludes that Blue was entitled not to the dismissal of the indictments, which he sought, nor to a remand for a new trial, but to only intervention by habeas corpus or mandamus prior to trial, and regrettably the time had long since passed when this remedy might be exercised. The result was that although Blue's basic rights had been violated, there was nothing that could now be done to remedy the wrong.

Even if this latter conclusion were correct, which the appellant does not admit, still it is surely a harsh rule that it must apply to cases tried before Blue was decided. If it is to be applied at all, it should be applied only prospectively, that is, it should be applied in only cases coming on for trial after the Blue decision.

In the instant case, for example, counsel appointed by the District Court to represent the appellant did not pursue the remedy which this Court says must be pursued if the wrong is to be remedied. But the reason that he didn't is of course that this Court hadn't announced its rule at that time. How was counsel to know that the point could not be first raised on appeal and that appellant would be forever cut off if he didn't petition for habeas corpus or mandamus before trial?

Appellant urges that he should not be, and is not, cut off from relief for violations of his rights under the 1960 Act, first adjudicated in Blue long after he was tried and convicted, merely because he did not pursue before trial the remedy that this Court now announces, for the first time, that he should have pursued. Appellant urges that he is entitled to a dismissal of the indictment, which is the only relief that will assuredly remove all taint of illegality and unfairness.

However, even admitting the correctness of the Court's conclusion that rights conferred by the 1960 Act do not survive trial and may not be asserted after conviction, it does not necessarily follow that rights arising from other sources are similarly cut off. For appellant submits that rights guaranteed to him under the constitution may be asserted on appeal whether or not theretofore raised. We now turn to a consideration of these rights.

II. FAILURE TO AFFORD THE ASSISTANCE OF ASSIGNED COUNSEL TO THIS INDIGENT DEFENDANT FOR A PERIOD OF 33 DAYS WHILE HE WAS IN JAIL CONSTITUTED A DENIAL OF THE SIXTH AMENDMENT GUARANTEE OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment guarantees the accused in every criminal prosecution the right "to have the assistance of counsel for his defense." Appellant urges that the failure to assign counsel for the period of 33 days beginning with the date of his arrest -- a period during which he was in jail and without funds and without counsel of any kind -- deprived him of this assistance. That the preparation of his case should have been going forward during this period, as was the preparation of the case against him, is clear.

It is appellant's position that the assistance guaranteed by the Sixth Amendment includes assistance in the preparation of a defendant's case as well as in its presentation. The scope of the assistance guaranteed has been the subject of numerous decisions in this court and in the Supreme Court. A leading case holding that the guarantee includes assistance in the preparation of a case also contained the first pronouncement by the Supreme Court that such assistance must be "effective." This is the case of Powell v. State of Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932), in which the Court said:

> ". . . . in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." 287 U.S. at page 71. (Emphasis supplied.)

Thirty years later, in another leading case -- Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963) -- the Supreme Court, in again recognizing the right to counsel for preparation of the defense of the indigent accused, abolished the distinction between capital cases and other cases and held the right to apply to assistance in the preparation of criminal cases generally.

The latest expressions of the Supreme Court are found in Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964), where the Court, in holding that police had violated the accused's Sixth Amendment right to assistance of counsel by denying his request for the opportunity to consult with his lawyer during police interrogation, again affirmed the vital importance of the proceedings prior to trial.

It is difficult to see how assistance of counsel can be truly effective, as the Supreme Court has said it must be, unless it is provided early in the proceedings, and there is much judicial belief that it must be provided soon after arrest.

Indeed, four members of this Court, in Jones v. United States, _____ U.S. App. D. C. _____, _____F. 2d_____, (decided July 16, 1964) on rehearing en banc, quote with approval (at page 17 of slip opinion) the following language from Lee v. United States, 322 F. 2d 770 (CA 5, 1963):

> "No one can dispute the truth of Professor Chafee's statement, "A person accused of crime needs a lawyer after his arrest probably more than at any other time.' It would not be unreasonable therefore to recognize an accused's right to counsel from the moment of arrest."

The Chief Judge of this Court in an address entitled "The Future of Reform in the Administration of Criminal Justice" delivered on April 8, 1964

and reported in 35 F.R.D. 99, at page 101 has said:

> "Courts in the vanguard are suggesting that counsel ought to be present not only at formal proceedings but at every point at which the case may be won or lost. This would mean that counsel should be present whenever the police question an arrested man."

Furthermore, four members of the Supreme Court have said, in Crooker v. State of California, 357 U.S. 433, 448, 78 S. Ct. 1287 (1958),

> ". . . . the accused who wants a counsel should have one at any time after the moment of arrest."

The rationale of this proposition was well expressed by Professor William M. Beaney, a distinguished authority in the area of the right to counsel, in an article on "Right to Counsel Before Arraignment," in 45 Minn. L. Rev. 771, 780 (1961). Professor Beaney points out that the tardy appointment of counsel results in fundamental unfairness of a kind that may permeate a trial without resulting in the kind of tangible evidence of impropriety needed under the "fair trial" rule. Only if the defense has an opportunity to prepare for trial substantially equal to that enjoyed by the prosecution can the proceeding be considered fundamentally fair. This means that the accused must have the advice and assistance of counsel soon after arrest.

It is submitted that no one can examine the record in this case without concluding that this indigent accused was not only in need of counsel but badly in need of counsel and that this need existed all along and did not begin 33 days after he was arrested and sent to jail. Failure to provide this accused with counsel for this period denied him the effective assistance of counsel guaranteed by the Sixth Amendment.

The recent decision of this Court in Reid v. United States, 117 U. S. App. D. C. 112, 326 F. 2d 655 (1964), rehearing en banc denied January 10, 1964, cert. den. 377 U.S. 946, is clearly distinguishable. In that case, in which there was a conviction for robbery, the defendants' argument on appeal that they had been denied the effective assistance of counsel in the preparation of their case was denied. However, the facts were that the defendants had been represented by court-appointed counsel at the preliminary hearing held on the day of their arrest and that, although formal notice of appointment of other counsel was not received until after the defendants had been arraigned, one of the appointed counsel had been notified of his appointment by telephone the day before the arraignment and had in fact appeared at the arraignment, where pleas of not guilty were entered. The record showed nothing with respect to the activities of the originally-appointed counsel other than the fact of his appearance at the preliminary hearing.

In the present case, the record shows that appellant was not represented by counsel at either the preliminary hearing or the arraignment and that in fact counsel was not appointed to assist him until 33 days after his arrest.

III. FAILURE TO AFFORD THE ASSISTANCE OF ASSIGNED COUNSEL TO THIS INDIGENT DEFENDANT AT HIS PRELIMINARY HEARING CONSTITUTED A DENIAL OF THE SIXTH AMENDMENT REQUIREMENT THAT COUNSEL BE MADE AVAILABLE TO A CRIMINAL DEFENDANT AT EVERY CRITICAL STAGE OF THE PROCEEDINGS AGAINST HIM.

In the argument under Point II, above, it has been pointed out that the Sixth Amendment guarantee of the assistance of counsel to an indigent defendant means effective assistance and that this effective assistance is denied if the assignment of counsel is delayed beyond the time when preparation of the defense should have been under way.

It will now be urged under Point III that the Sixth Amendment guarantee requires that counsel be made available at every critical stage of the proceedings and that this was denied by failure to provide this indigent defendant with counsel at his preliminary hearing.

The facts of the case leading to this conclusion are that when appellant first appeared before the United States Commissioner on April 1, 1963, he was informed of his right to retain counsel but was not asked whether he was able to retain counsel. He was not offered the assistance of assigned counsel nor advised of his unqualified right to counsel. He stated that he wanted a hearing, and the Commissioner proceeded to give him a hearing. A government witness testified against him and the Commissioner made a finding of probable cause against him. During this entire proceeding, including the preliminary hearing itself, the defendant was not represented by counsel. (Rec.)

The Supreme Court has recently held, in White v. Maryland, 373 U. S. 59, 83 S. Ct. 1050 (1963) that constitutional requirements were not complied with when the assistance of counsel was denied at a preliminary hearing in a Maryland court. However, the Supreme Court pointed out

that the basis for its decision was not the fact that the defendant had been deprived of counsel at a proceeding denominated a "preliminary hearing" but that he had been deprived of counsel at a critical stage of the proceedings against him. The test laid down by the Supreme Court is accordingly that of whether a defendant has been deprived of counsel at a critical stage, and this in turn depends upon whether, upon the facts of the case, the stage of the proceedings is one when substantial elements of his defense require protection.

The question in the present case, then, is th at of whether, under the circumstances, the preliminary hearing constituted a critical stage of the proceedings against this indigent accused in the District of Columbia.

Perhaps the first case that need be noted in this connection is that of Wood v. United States, 75 U.S. App. D.C. 274, 128 F. 2d 265 (1942). This Court here held that the Commissioner is under a duty to inform the accused of his right to counsel before holding a preliminary hearing. The facts were that pleas of guilty, allegedly made at a preliminary hearing before a police magistrate at which the indigent defendants were without counsel, were admitted in evidence against them at trial and they were convicted of robbery. They had not had counsel previously not subsequently until the arraignment eleven days before trial, when the District Court assigned counsel to represent them. They then pleaded not guilty. In reversing and remanding the cause, this Court said the main issue was that of the privilege against self-incrimination, but that a closely related question was that of whether constitutional guarantees require that defendants be informed of their <u>right to counsel</u> at such a hearing. As to this, the Court says that the preliminary hearing is "in subject matter and function" a judicial proceeding and that "it should

be so in essential procedure." The Court added, "For the same reasons the accused is entitled to have counsel at the hearing." (128 F. 2d 271) Referring to the protection this affords, the court says,

> "The period of protection includes time for adequate preparation. It extends to 'every step in the proceedings against' the accused. The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary inquisition which would squeeze out conviction or prejudice by means unconstitutional if used at trial. (128 F. 2d 271).

The Court also says that a preliminary hearing results in prejudice to a defendant where he sustains a "temporary loss of liberty."

Seven years later this Court decided Council v. Clemmer, 85 U.S. App. D. C. 74, 177 F. 2d 22 (1949), cert. den. 338 U.S. 880 (1949). This appeared to be a step backward. The accused in that case did not have counsel at either his preliminary hearing or his arraignment. He pleaded not guilty at both proceedings. As against his argument to this Court that the guarantees of the Sixth Amendment had been violated, this Court held that there is no constitutional requirement that the accused be represented by counsel at a preliminary hearing or arraignment when he pleads not guilty. The court said, "Nothing of substance prejudicial to a defendant occurs upon the making of that plea." (177 F. 2d 24)

If this was ever the law, it certainly no longer is, as is made plain by the later decision of this Court in Ricks v. United States, _____ U. S. App. D. C. _____, 334 F. 2d 964 (1964). Here, this Court says that Council holds only that "a conviction is not subject to collateral attack merely because counsel was absent during pre-trial proceedings," and adds that Hamilton v. Alabama and White v. Maryland, supra, "cast doubt on the Council dicta that a lawyer is necessary" at a preliminary hearing

or arraignment "only if a defendant pleads guilty." (334 F. 2d 967, Note 2).

In Ricks this Court reversed and remanded for a new trial a conviction for robbery, assault with a dangerous weapon, and housebreaking. On the day after defendant's arrest, he had been taken before the Commissioner. The Commissioner had advised him of "his right to retain counsel." He had also advised him that he might choose either (1) to have a hearing; (2) to waive the hearing; or (3) to postpone the hearing "for the purpose of contacting counsel or contacting any member of his family relative to securing counsel for him." (334 F. 2d 966). When defendant chose the last alternative, the hearing was continued for three days and defendant was held without bond. Immediately after the continuance, and while he was in jail, the police obtained statements from him in which he admitted several crimes, including those charged here. When defendant appeared at the preliminary hearing three days later, the Commissioner appointed Legal Aid counsel to assist him. At trial, all of the statements were admitted in evidence against him over his objection. This Court held, in reversing and remanding, that these uncounseled statements were improperly admitted. The Court cites with approval its decision in Wood that the accused is entitled to counsel as of right and says that the police activities violated the specific order of the Commissioner purporting to implement his right to counsel. Moreover, this Court points out that at the first appearance,

> "The Commissioner did not offer to appoint counsel for Ricks if he was indigent. He was apparently prepared to hold the hearing without counsel if Ricks chose this alternative; he would also have allowed Ricks to waive hearing without a lawyer's advice." (334 F. 2d 966, Note 2).

As to the statement of the Court in Council that there is no prejudice to a defendant if he enters only a plea of not guilty, this Court says:

> "Quoting a Ninth Circuit case which had asserted that 'the preliminary hearing is an ex parte proceeding,' the Council opinion concluded that no prejudice could occur if a 'not guilty' plea was entered. But Wood had pointed out that the temporary loss of liberty authorized by the Magistrate's 'judicial proceeding' was itself prejudicial." (334 F. 2d 967, Note 2).

In the light of the foregoing decisions it is submitted that the preliminary hearing is a critical stage of the proceedings against a defendant accused of crime and that failure to advise such a defendant of his right to have counsel assigned to assist him and failure actually to provide counsel constitute a denial of the guarantee of the Sixth Amendment that counsel be made available at every critical stage of the proceedings against him.

In the instant case, the preliminary hearing accorded the appellant was clearly a critical stage. It was a proceeding that was judicial in character and effect. A witness testified aginst the appellant. The Commissioner, upon the basis of this testimony, made a finding of probable cause against the appellant, and the appellant was deprived of his liberty. Certainly the appellant required protection and assistance. If the appellant had been represented by counsel, he might have been able to show lack of probable cause and thus win his freedom. Yet, the Commissioner did not advise him of his right to counsel and did not provide counsel to represent him at this critical stage. It cannot be denied that this denial of constitutional guarantees was prejudicial and injurious to the appellant in the extreme. It is only by a dismissal of the indictment against him that this prejudice and injury can be completely eradicated.

IV. FAILURE TO AFFORD THE ASSISTANCE OF ASSIGNED COUNSEL TO THIS INDIGENT ACCUSED AT HIS ARRAIGNMENT CONSTITUTED A DENIAL OF THE SIXTH AMENDMENT REQUIREMENT THAT COUNSEL BE MADE AVAILABLE TO A CRIMINAL DEFENDANT AT EVERY CRITICAL STAGE OF THE PROCEEDINGS AGAINST HIM.

Appellant was still without counsel twenty-six days after his arrest, when he appeared before Judge McGuire for arraignment. Although the Court asked appellant several questions about retaining counsel or acting as his own counsel, the central fact is that the Court didn't advise appellant that he was entitled as of right to have counsel assigned to represent him and didn't ask whether he wanted counsel assigned to represent him. Furthermore, although at the conclusion of the proceeding the Court did direct that counsel be assigned to represent him, the central fact is that the Court did not provide counsel for this proceeding and did enter a plea of not guilty in the absence of counsel.

Whatever may be the law in state courts, in federal courts the arraignment is a critical stage in proceedings against an accused, and the indigent accused is entitled, as of right, to have counsel appointed to represent him at arraignment. To the extent that Council v. Clemmer, supra, is inconsistent with this statement of the law, it is no longer controlling, as pointed out above.

As stated in Hamilton v. State of Alabama, 368 U. S. 52, 82 S. Ct. 157 (1961):

> "Arraignment has differing consequences in the vaious jurisdictions. Under federal law an arraignment is a sine qua non to the trial itself - the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried." (368 U. S. 54, Note 4).

This Court had before it the appeal of a criminal defendant who was without counsel at his arraignment, at which he pleaded guilty, in Evans v. Rives, 75 U. S. App. D. C. 242, 126 F. 2d 633 (1942). In considering the nature of an arraignment as a critical stage in the proceedings against an accused, this Court said:

> ". . . . an accused is no less an accused at that stage of the proceedings than at any other, and, as we have pointed out above, no less in need at that stage than at any other of the assistance of counsel. The constitutional guarantee makes no distinction between the arraignment and other stages of criminal proceedings in respect of the application of the guarantee." (126 F. 2d 641).

Furthermore, Hamilton v. Alabama, supra, tells us that no distinction is any longer to be drawn between an arraignment where a defendant pleads guilty and one where he pleads not guilty.

In Jones v. United States, supra, four members of this Court said with reference to the right of a criminal defendant to be represented by counsel at his arraignment:

> "The right to counsel does not begin at trial. If it began then, it would often be worth little, for cases are often lost at earlier stages. The accused 'requires the guiding hand of counsel at every step of the proceedings against him.' Powell v. Alabama, 287 U.S. 45, 69 (1932). This is a constitutional principle, not a mere factual observation. Accordingly, the accused is entitled to counsel at arraignment. Hamilton v. Alabama, 368 U.S. 52 (1961); Evans v. Rives, 75 U.S. App. D.C. 242, 250, 126 F. 2d 633, 641 (1942)." Jones v. United States, supra, at page 15. (emphasis supplied.)

Appellant's off-hand assertions at his arraignment that he did not want an attorney can not be regarded as intelligently made, and as the Supreme Court has said in Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019 (1938),

"'Courts indulge every reasonable presumption against waiver' of fundamental rights." (304 U.S. 464).

In the instant case, in failing to provide counsel to represent appellant at his arraignment, the Commissioner denied to him the assistance of counsel at a stage of the proceedings which was "sine qua non" to the trial itself. Appellant was thereby effectually denied the protection guaranteed to him by the Constitution.

V. SINCE THE RIGHT TO RETAIN COUNSEL FOR THE PRELIMINARY HEARING IS ABSOLUTE, FAILURE TO ASSIGN COUNSEL TO THIS INDIGENT ACCUSED FOR HIS PRELIMINARY HEARING CONSTITUTED A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

Rule 5(b) of the Federal Rules of Criminal Procedure makes it mandatory upon the Commissioner that he advise the accused, among other things, "of his right to retain counsel," and requires the Commissioner to "allow the defendant reasonable time and opportunity to consult counsel."

Rule 44 of the Federal Rules of Criminal Procedure requires that,

> "If the defendant appears in Court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

The Advisory Notes on Rule 44 state:

> "The rule is intended to indicate that the right of the defendant to have counsel assigned by the court relates only to proceedings in court and, therefore, does not include preliminary proceedings before a committing magistrate. Although the defendant is not entitled to have counsel assigned to him in connection with preliminary proceedings, he is entitled to be represented by counsel retained by him, if he so chooses . . . " 18 U.S.C.A. Rule 44, Notes of Advisory Committee on Rules, Note 2.

The result of these rules is to permit criminal defendants to be represented by retained counsel at the preliminary hearing but very pointedly to refuse to assign counsel to represent them at the preliminary hearing. It is submitted that this is a patent "invidious discrimination" between rich and poor, which violates the due process clause of the Fifth Amendment and denies the equal protection of the laws.

The fact that under Rule 5(b) the criminal defendant is assured that he shall know of his right to retain counsel is a clear affirmation that the advice and assistance of counsel are critical at this stage of

the proceedings against him; and since the advice and assistance of counsel are critical at the preliminary hearing, it is a transparent denial of the equal protection of the laws not to provide counsel to indigent defendants, such as the appellant here, who are unable to retain counsel but who are quite as much in need of counsel.

The Supreme Court has several times said that in the matter of procedural safeguards, no distinction is to be made between rich and poor. For example, in Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585 (1956), the Court held that an indigent defendant must not be denied a copy of the trial record for use on appeal because he could not pay for it. Saying that ". . . . our own constitutional guaranties of due process and equal protection call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons," the Court continues,

> "In criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial . . . ." (351 U.S. 17).

This Court has recently recognized these principles in Washington v. Clemmer, _____U.S. App. D.C. _____, _____F. 2d_____ (No. 18602, May 11, June 12, 1964) (Slip opinion May 11). There, in reversing a conviction because the trial court had erroneously overruled the request of an indigent defendant that he be afforded a reporter at his preliminary hearing, the Court said:

> "We also think this course is required by minimal standards of fair and equal justice. Defendants who have funds are entitled

> to employ their own reporters. To deny this opportunity to an indigent defendant would be to permit invidious discriminations based on wealth. Furthermore, since the government may have a reporter at the hearing, the accused must be afforded the same right in order to meet the requirements of fundamental fairness." (Id., at 4-5, 6-7).

While it is true that the equal protection clause appears in only the Fourteenth Amendment, it is nonetheless clear that a defendant in a criminal case in the District is entitled to the equal protection of the laws. Any doubt as to this was resolved by the Supreme Court in Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693 (1954), where the Court said:

> ". . . . The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'Equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." (347 U.S. 499).

The obvious inadequacy of Rules 5 (b) and (44) to meet constitutional guarantees is nowhere more clearly illustrated than in the provisions of the new Rules 5 (b) and 44 proposed by the Advisory Committee on Criminal Rules. But those new rules have not been adopted, and the fact remains that in the instant case, appellant was given a preliminary hearing, was indicted, was arraigned, tried, and convicted under a system of rules which permits counsel at a preliminary hearing for an accused who can afford to employ a lawyer but denies counsel to the indigent accused who is without funds.

VI. FAILURE TO PRESENT OR CONSIDER THE ISSUE OF THE POSSIBLE INSANITY OF THE ACCUSED DEPRIVED HIM OF A FAIR TRIAL.

On June 26, 1963, John F. Burke, Esquire, the first Court-appointed counsel for the accused, filed a motion that the accused be committed to a mental hospital for the purpose of examining him to determine his mental condition and his competency to stand trial. Mr. Burke supported his motion with an affidavit in which he stated, among other things:

. . . . . .

> "3. That a check of the court records herein, as well as those of Juvenile Court, reveals that this defendant has been in trouble with the law since 1943.
>
> "4. That the records pertaining to this defendant and which records were examined by your affiant at District of Columbia Jail, reveal the following:
>
> (a) That the defendant has been a user of narcotics (heroin) as early as 1951.
>
> (b) That the defendant was diagnosed in approximately April of 1953, as possessing a sociopathic personality disturbance, anti-social reaction, and that the use of drugs by this defendant is evidence of his psychopathic nature; that he is emotionally unstable and subject to anxiety and apprehension, and was hospitalized for a period of three days in 1957 for acute anxiety state; that he was regarded as a sociopathic personality with psychosis; that he had engaged in or attempted to engage in extensive homosexual activity while in confinement and had displayed an assultive nature. In addition these records noted that the defendant had been hospitalized from August 10 to August 15, 1944 for secondary syphilis, recurrent." (Rec.)

The District Court committed the accused to St. Elizabeth's Hospital and by letter dated September 27, 1963 and filed October 8, 1963, the Superintendent of St. Elizabeth's made his report. It was found that

there was no mental disease or defect at that time nor at the time of the criminal acts charged and that the accused was mentally competent for trial. However, it was also found that on the date of his arrest and on the date of the criminal acts charged he was "actively addicted to narcotics and that the criminal acts with which he is charged, if committed by him, were causally related to his narcotic addiction." It was found also that the drug addiction did not constitute a mental illness and was not related to, or a result of, a mental illness. (Rec.)

There is no mention in the report of the possible effect of the recurrent syphilis upon the accused's mental condition.

On January 28, 1964, the case came on for trial, but, as stated in the Supplemental Order entered that date, ". . . . it appearing to the Court from observation of the defendant that it would be advisable to further determine his mental competence and with the consent of counsel for both the government and the defendant," the accused was again committed to St. Elizabeth's for a further determination of his mental competence. (Rec.)

The Superintendent's report, dated March 26, 1964 and filed on the same date, this time finds merely that the accused is "mentally competent for trial." (Rec.)

Notwithstanding the long record detailed in Mr. Burke's affidavit, the defense of insanity was not raised at trial. (At the beginning of the Opening Statement In Behalf of The Defendant, counsel stated: "Ladies and gentlemen of the jury, the government has completed its case, and it is

now, under our procedure, time for the defendant to put on his defense. Our defense is simply this: A general denial that this man ever sold any narcotics, either to the special employee, Harris, or the officer, Moore; that he is not the person who transferred these narcotics. That is our sole defense." (Tr. 111). It would certainly appear that the defense should have been raised, and even though not raised by the accused, it should have been considered by the court sua sponte. There is no indication in the record on appeal or in the trial transcript that this was done.

VII. THERE WAS INSUFFICIENT EVIDENCE OF GUILT TO SUBMIT TO THE JURY, AND THE DISTRICT COURT ERRED IN NOT GRANTING APPELLANT'S MOTIONS FOR ACQUITTAL.

After the government had rested its case in chief, the appellant moved for judgment of acquittal upon the ground that the government had failed to prove its case. The motion was denied. (Tr. 104).

It is submitted that the motion was meritorious and should have been granted, and it is submitted that the Court erred in not doing so.

The central facts -- those surrounding the alleged purchase and transfer of the narcotics -- were sought by the government to be established by the testimony of two witnesses. One of these witnesses was Atria Harris, a paid undercover informer employed on a part-time basis by the Metropolitan Police Department. (Tr. 3, 160). Mr. Harris had himself been in jail several times as a result of convictions for selling narcotics (Tr. 4, 18). The other principal witness as to the facts of the alleged purchase and transfer of narcotics was plain-clothes officer Rufus Moore, of the Metropolitan Police Department, at the time of the alleged criminal acts assigned to the Narcotics Squad (Tr. 29).

These government witnesses testified concerning a small glassine envelope which allegedly contained a white powder (marked government's Exhibit 1-A for identification) and a larger manila envelope in which the small glassine envelope was allegedly placed (marked government's Exhibit 1 for indentification). This testimony, going to the very heart of the government's case, should have been clear and convincing, but it was in fact confused, conflicting, and self-contradictory. This is especially true of the testimony concerning the signing or initialing

of these envelopes.

Typical of this line of testimony is the following:

Officer Moore had testified on direct examination that Harris had initialled one of the envelopes. Yet, on cross examination of Officer Moore the following colloquy occured:

"Q. How, after you and Harris went back to your automobile after the alleged transaction, did you have anything, did you get anything from him, that is Harris, other than the capsule that you stated you received? Did you receive anything else besides the capsule?

"A. There was a bag. No, sir, I didn't.

"Q. And the bags?

"A. No, I didn't.

"Q. And at the time that you got in the car on 14th Street, other than bring it out and have him initial it, is that when it was done, or did you move away from there?

"A. I moved.

"Q. Where from?

"A. I don't recall what street it was, but out of that immediate area.

"Q. It didn't happen as soon as you got in the car, you drove away?

"A. Yes, I drove away.

"Q. Would you say one, two, or three blocks?

"A. I don't recall. I know it wasn't in the immediate area where the transaction was. I got out of the area.

"Q. And both of you were sitting in the front seat of the car?

"A. Yes, sir.

"Q. And then you took it out of your pocket and that is when he marked it?

"A. I took the small envelope from the trunk of my car, yes, sir.

"Q. And that is when he marked it?

"A. That is when he was supposed to have marked it, yes, sir.

"Q. Not when he was supposed to have marked it. Didn't he mark it then?

"A. Well, evidently he didn't from seeing the bag, because I don't see his initials on there.

"Q. Under your direct examination, didn't you testify, didn't you state he marked it in the car?

"A. Yes, sir, I did.

"Q. And do you want to change that testimony now?

"A. I am not changing it from what I said. I said he marked it, but apparently he didn't." (Tr. 51-52).

Another illustative colloquy from the cross examination of Officer Moore was as follows:

"Q. On your direct testimony you stated that he marked the bag and he marked the envelope?

"A. Yes, sir.

"Q. Now you say you presume he did. Now which is right: Did you actually see him mark the bag?

"A. Yes, sir. I saw him mark the envelope.

"Q. Did you see him mark the bag?

"A. Well, I just said evidently he didn't mark the bag because it doesn't have his initials on it. But this is the procedure that is followed and done in all cases and from a natural procedure of all of the cases I said he marked it because it is always done and this is just an exception." (Tr. 53-54).

In addition to the uncertainty as to who had marked or initialled what, there was also a failure on the part of the government to establish just when Officer Moore had received the glassine envelope from Harris. Thus on recross examination, Officer Moore testified:

"Q. Is there any date on here?

"A. I didn't place one on there.

"Q. You didn't place any date on there?

"A. No, sir."

THE COURT: "On here, again, is the glassine bag? Is that correct?

Mr. Amos (Counsel for the accused): "That is correct, Your Honor." (Tr. 66).

Again on recross examination, Officer Moore indicated uncertainty as to the exact custody of the little glassine envelope. He testified as follows:

"Q. Officer, make sure that there is no question in your mind that the transfer of this manila envelope from you to Harris and back took place inside your vehicle that day, December 7th?

"A. The transfer of the manila envelope to Harris and back to me?

"Q. Yes, sir.

"A. Well, if it was really a transfer to him, he placed his signature on it.

"Q. You just held this while he signed it?

"A. Yes.

"Q. You held it?

"A. He held it while he signed his name on it.

"Q. He gave it back to you?

"A. Yes, sir.

"Q. Was that at the precise moment and where was the little glassine bag?

"A. I had it.

"Q. You had it?

"A. Yes, sir.

"Q. Where?

"A. In my hands.

"Q. Did you hand it over to him?

"A. No, sir, I didn't.

"Q. Are you positive?

"A. Yes, sir.

"Q. You never handed it to him?

"A. No, sir.

"Q. He handed it to you but you never handed it to him?

"A. Not that I recall, no, sir. No.

"Q. Are you positive or is your recollection bad, which?

"A. Well, sir, I can explain this with an explanation.

"Q. I would prefer an answer to my question. Are you positive?

THE COURT: I think he has testified he is positive.

Mr. Amos (Counsel for the accused): That he is not positive.

THE COURT: He is not positive? You are not positive?

The Witness: No, sir, I am not." (Tr. 69-70).

The foregoing excerpts from the transcript are typical of much of the government's case in chief on the important central facts of the alleged sale of narcotics by the appellant and the transfer and subsequent custody of the narcotics. In this highly unsatisfactory and inconclusive state of the government's case, the District Court should have granted appellant's motion.

Again, at the conclusion of the entire case,appellant moved for judgment of acquittal, and again the motion was denied (Tr. 201). There had been no testimony in the subsequent proceedings that had in any way remedied the confusion and uncertainty of the testimony of the government's principal witnesses, and on the other hand, the appellant had taken the stand and testified in his own behalf and had categorically denied the charges against him (Tr. 168-172). The District Court erred in submitting the case to the jury.

CONCLUSION

For each and all of the foregoing reasons appellant submits that his conviction should be reversed and the case remanded with directions to vacate the judgment of conviction and to dismiss the indictment.

Respectfully submitted,

Charles M. Fistere

Charles M. Fistere

Benjamin G. Habberton

Benjamin G. Habberton

Court-Appointed Counsel
301 Continental Building
1012 Fourteenth Street, N.W.
Washington, D. C. 20005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been hand-delivered to the attorney for Appellee: The United States Attorney, at the United States Courthouse, Constitution Avenue and John Marshall Place, Washington, D. C., this 15th day of January, 1965.

Benjamin G. Habberton

Benjamin G. Habberton

Court-Appointed Counsel for
Oscar Dancy, Jr., Appellant

301 Continental Building
1012 Fourteenth Street, N. W.
Washington, D. C. 20005